(9)

No. 95-1225-CFX

Title: United States, Petitioner
v.
Marian Brockamp, Administrator of the Estate of Stanley B. McGill, Deceased
and
United States, Petitioner
v.
Nicholas T. Scott

Docketed:
January 31, 1996

Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Dec 22 1995	Application (A95-541) to extend the time to file a petition for a writ of certiorari from January 3, 1996 to February 2, 1996, submitted to Justice O'Connor.
	Dec 27 1995	Application (A95-541) granted by Justice O'Connor extending the time to file until February 2, 1996.
	Jan 31 1996	Petition for writ of certiorari filed. (Response due May 12, 1996)
	Mar 4 1996	Waiver of right of respondent Nicholas T. Scott to respond filed.
	Mar 13 1996	DISTRIBUTED. March 29, 1996
	Mar 22 1996	Response requested. (Due April 23, 1996)
	Apr 15 1996	Order extending time to file response to petition until May 12, 1996.
	May 10 1996	Brief of respondent Marian Brockamp in opposition filed.
	May 10 1996	Motion of Vincent Tassinari for leave to file a brief as amicus curiae filed.
	May 13 1996	Brief of respondent Nicholas T. Scott in opposition filed.
	May 15 1996	REDISTRIBUTED. May 31, 1996
	Jun 3 1996	Motion of Vincent Tassinari for leave to file a brief as amicus curiae GRANTED.
	Jun 3 1996	Petition GRANTED. SET FOR ARGUMENT December 3, 1993. **********
	Jun 20 1996	Motion of petitioner the Solicitor General to dispense with printing the joint appendix filed.
	Jul 15 1996	Order extending time to file brief of respondent on the merits until September 3, 1996.
	Jul 17 1996	Brief of petitioner United States filed.
	Aug 29 1996	Record filed.
	Aug 29 1996	Brief of respondents Marian Brockamp, Administrator, et al. filed.
	Sep 5 1996	Motion of petitioner the Solicitor General to dispense with printing the joint appendix GRANTED.
	Sep 27 1996	Reply brief of petitioner United States filed.
	Oct 29 1996	CIRCULATED.
	Dec 3 1996	ARGUED.

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95-1225

No.

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

MARIAN BROCKAMP, ADMINISTRATOR OF THE ESTATE OF STANLEY B. MCGILL

UNITED STATES OF AMERICA, PETITIONER

v.

NICHOLAS T. SCOTT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the doctrine of equitable tolling may be applied to enlarge or suspend the statutory periods that limit (i) the time in which a claim for refund of income taxes may be filed (26 U.S.C. 6511(a)) and (ii) the amount of any recovery upon a timely filed claim (26 U.S.C. 6511(b)).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement:	
A. *United States* v. *Brockamp*	4
B. *United States* v. *Scott*	10
Reasons for granting the petition	11
Conclusion	21
Appendix A	1a
Appendix B	17a
Appendix C	31a
Appendix D	35a
Appendix E	60a

TABLE OF AUTHORITIES

Cases:

American Pipe & Construction Co. v. *Utah*, 414 U.S. 538 (1974)	19
Bowen v. *City of New York*, 476 U.S. 467 (1986)	19
Bull v. *United States*, 295 U.S. 247 (1935)	15
Burnett v. *New York Central R.R.*, 380 U.S. 424 (1965)	19
Capital Tracing, Inc. v. *United States*, 63 F.3d 859 (9th Cir. 1995)	18
Central Bank v. *First Interstate Bank*, 114 S. Ct. 1439 (1994)	18
First Alabama Bank, N.A. v. *United States*, 981 F.2d 1226 (11th Cir. 1993)	16
Girouard v. *United States*, 328 U.S. 61 (1946)	18
Hallstrom v. *Tillamook County*, 493 U.S. 20 (1989)	20
Honda v. *Clark*, 386 U.S. 484 (1967)	19
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990)	7, 12, 14, 17, 19

Cases—Continued: Page

Jones v. *Liberty Glass Co.*, 332 U.S. 524 (1947) 18
Kingston Products Corp. v. *United States*, 368 F.2d 281 (Ct. Cl. 1966) 16
Kreiger v. *United States*, 539 F.2d 317 (3d Cir. 1976) 13, 14
Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350 (1991) 12, 16
Miller v. *United States*, 38 F.3d 473 (9th Cir. (1994) 13
Oropallo v. *United States*, 994 F.2d 25 (1st Cir. 1993), cert. denied, 114 S. Ct. 705 (1994) ... 7, 8, 11, 12, 18
Republic Petroleum Corp. v. *United States*, 613 F.2d 518 (5th Cir. 1980) 16
Rosser v. *United States*, 9 F.3d 1519 (11th Cir. 1993) 16
United States v. *Dalm*, 494 U.S. 596 (1990) . 8, 11, 15, 17
Vintilla v. *United States*, 931 F.2d 1444 (11th Cir. 1991) 9, 11, 16, 17
Webb v. *United States*:
850 F. Supp. 489 (E.D. Va. 1994), aff'd, 66 F.3d 691 (4th Cir.1995) 9
66 F.3d 691 (4th Cir. 1995) 11, 13, 14, 15, 16, 18

Statutes:

Internal Revenue Code (26 U.S.C.):
§§ 1311-1314 17
§ 6511 ..... *passim*
§ 6511(a) 6, 8, 11, 12, 13, 15, 18
§ 6511(b) 6, 7, 8, 12, 13, 15, 18-19
§ 6511(b)(2) 12, 16
§ 6511(b)(2)(A) 12
§ 6511(b)(2)(B) 7, 12
§ 6511(d) (1988 & Supp. V 1993) 16, 17
§ 7422(a) 4, 6, 11
§ 7429 18

Miscellaneous: Page

Development in the Law—Statutes of Limitations, 63 Harv. L. Rev. 1177 (1950) 19
2 Wood, *Limitation of Actions* (4th ed. 1916) 19

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these two cases. See Rule 12.4 of the Rules of this Court.

OPINIONS BELOW

1. The opinion of the court of appeals in *United States* v. *Brockamp* (App., *infra*, 1a-16a) is reported at 67 F.3d 260. The opinion of the district court (App., *infra*, 17a-30a) is reported at 859 F. Supp. 1283.

2. The opinion of the court of appeals in *United States* v. *Scott* (App., *infra*, 31a-34a) is unreported, but the decision is noted at 70 F.3d 120 (Table). The opinions of the district court (App., *infra*, 35a-59a, 60a-76a) are reported at 795 F. Supp. 1028 and 847 F. Supp. 1499.

JURISDICTION

The judgments of the court of appeals in *United States* v. *Brockamp* (App., *infra*, 1a) and *United States* v. *Scott* (App., *infra*, 31a) were entered on October 5, 1995. On December 27, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 2, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 6511 of the Internal Revenue Code, 26 U.S.C. 6511, provides in relevant part:

> **(a) Period of limitation on filing claim.**—Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

> **(b) Limitation on allowance of credits and refunds.—**
>
> **(1) Filing of claim within prescribed period.**—No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.
>
> **(2) Limit on amount of credit or refund.—**
>
> **(A) Limit where claim filed within 3-year period.**—If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. If the tax was required to be paid by means of a stamp, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim.
>
> **(B) Limit where claim not filed within 3-year period.**—If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

> **(C) Limit if no claim filed.**—If no claim was filed, the credit or refund shall not exceed the amount which would be allowable under subparagraph (A) or (B), as the case may be, if claim was filed on the date the credit or refund is allowed.
>
> * * * * *

2. Section 7422(a) of the Internal Revenue Code, 26 U.S.C. 7422(a), provides:

> **No suit prior to filing claim for refund.**—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

STATEMENT

A. *United States* v. *Brockamp*

1. Respondent Marian Brockamp is the administrator and sole beneficiary of the estate of her father, Stanley McGill. In 1984, Mr. McGill transmitted $7000 to the Internal Revenue Service in payment of income taxes for 1983. At the same time, Mr. McGill submitted a request for an extension of time for the filing of his return. He did not, however, thereafter file an income tax return or a claim for refund for the 1983 tax year. In 1984, McGill was 93

years old. According to respondent, he was "senile" and "mentally deranged" at that time (App., *infra*, 18a-19a).

Mr. McGill died in 1988. After respondent was appointed administrator of his estate, she wrote the IRS to request a refund of the taxes that he paid for 1983. She stated that "her father had been senile and had mistakenly sent a check for $7,000 instead of $700" to the IRS (App., *infra*, 19a). Respondent submitted an income tax return for Mr. McGill for the 1983 tax year which indicated that his liability for taxes for that year was $427 (*ibid.*).

The IRS denied the requested refund. The Service noted that the taxes were paid "more than three years prior to her claim" (App., *infra*, 19a) and that the requested refund was therefore barred by Section 6511 of the Internal Revenue Code, 26 U.S.C. 6511.

2. Respondent thereafter commenced this tax refund action in federal district court on behalf of the estate. She contended (i) that the doctrine of equitable tolling applies to the limitation periods for income tax refunds under Section 6511 and (ii) that the claimed mental incompetency of Mr. McGill is a sufficient basis for equitable tolling to apply.[1]

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[1] Respondent also contended that the $7000 payment made by Mr. McGill was only a "deposit"—and not a payment of taxes—and was therefore not subject to the limitation periods of Section 6511 (App., *infra*, 22a). The district court rejected that contention, noting that "[t]here is no evidence that the check was intended as a deposit" (*id.* at 23a). The court of appeals reversed the district court on other grounds and therefore did not find it necessary to address respondent's contention that the payment was a "deposit." See *id.* at 8a n.1 (Fernandez, J., dissenting).

The district court concluded that the doctrine of equitable tolling does not apply to the statutory limitations upon tax refund actions set forth in Section 6511 of the Code. The court first noted (App., *infra*, 20a) that Section 7422(a) of the Code specifies that courts may not exercise jurisdiction over a tax refund suit unless "a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard" (26 U.S.C. 7422(a)). The court observed that the applicable "provisions of law" are contained in Section 6511(a), which provides that a claim for refund must be filed (26 U.S.C. 6511(a))

> within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

Because the refund claim submitted by respondent fell outside these statutory periods, the district court concluded that it lacked jurisdiction over the suit under Section 7422(a) (App., *infra*, 21a, 29a-30a).

The court further noted that, "[i]n addition to the time limitations of Section 6511(a), Section 6511(b) limits the *amount* of a refund recoverable by a claimant" (App., *infra*, 21a (emphasis added)):

> Specifically, if a person files a timely claim within the three-year period mentioned in Section 6511(a), the amount of a refund is limited to
>
> > the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return.

> 26 U.S.C. § 6511(b)(2)(A). If, however, a claim was not timely filed within the three-year period mentioned in Section 6511(a), the amount of
>
> > refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.
>
> 26 U.S.C. § 6511 (b)(2)(B). * * *

The court explained that the provisions of Section 6511(b) that establish substantive limitations on the *amount* of any refund—even on a timely filed claim—are not subject to the doctrine of equitable tolling (App., *infra*, 21a-22a, 27a-28a).

The district court noted that in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court "recognized that the courts have traditionally declined to apply equitable principles in cases against the government because waivers of sovereign immunity are to be strictly construed" (App., *infra*, 25a, citing 498 U.S. at 96-99). In *Irwin*, however, the Court "changed its approach to the issue of equitable tolling against the government and held that" (App., *infra*, 25a, quoting 498 U.S. at 95-96)

> the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.

Several lower courts thereafter relied on *Irwin* to "extend[] the doctrine of equitable tolling to tax refund cases" (App., *infra*, 25a-27a, citing cases). The district court concluded, however, that those decisions were not correct. The court noted that in *Oropallo* v. *United States*, 994 F.2d 25 (1993), cert. denied, 114 S. Ct. 705 (1994), the First Circuit (in a

per curiam opinion joined by then-Judge Breyer) concluded that the "rebuttable presumption" that equitable tolling applies to suits against the government is inapplicable to tax refund suits because the "limitations imposed by Sections 6511(a) and (b) are fundamentally inconsistent with the doctrine of equitable tolling" (App., *infra*, 27a, citing 994 F.2d at 30-31). The district court also noted that in *United States* v. *Dalm*, 494 U.S. 596 (1990), this Court held that an equitable claim for recovery of a tax overpayment was not exempt from the limitation periods of Section 6511 (App., *infra*, 28a-29a, citing 494 U.S. at 610).

Applying the reasoning of *Oropallo* and *Dalm*, the district court held that the periods of limitation on refund claims and refund recoveries under Sections 6511(a) and (b) are not subject to the doctrine of equitable tolling. Because the refund claim in this case was filed outside those periods of limitation, the court entered judgment for the government (App., *infra*, 29a-30a).

3. The court of appeals reversed (App., *infra*, 1a-8a), with Judge Fernandez dissenting (*id.* at 8a-16a). The majority opinion stated that this Court's decision in *Irwin* "effectively limited the *Dalm* decision" and "requires that, in the absence of congressional action, statutes of limitation are, as a general rule, presumed to be subject to equitable tolling in suits against the United States" (*id.* at 5a). The court found nothing in the text or history of Section 6511 to indicate "any intention [by Congress] that equitable tolling should not apply to § 6511" (*ibid.*). The court therefore concluded that "the statute of limitations provided in § 6511 may be equitably tolled" (*ibid.*).

The court noted that, in contexts not involving tax refund claims, "several post-*Irwin* courts have held that mental incompetence will toll statutes of limitation in suits against the government" (App., *infra*, 7a, citing cases). The court stated that it agreed with those decisions because (*id.* at 8a)

> [p]rinciples of equity mandate that when mental incompetence precludes a person from asserting his rights during the proper time period, he should not be precluded from later seeking redress for his injuries.

Because a "triable issue of fact [exists] as to Mr. McGill's mental incompetence," the court of appeals reversed the decision of the district court and remanded for further proceedings (*ibid.*).

Judge Fernandez dissented from the decision of the court of appeals because "the principles of equitable tolling cannot be applied to § 6511" (App., *infra*, 9a, 10a):[2]

> [A]lthough *Irwin* creates a rebuttable presumption of equitable tolling in most areas, *Dalm* effectively rebuts that presumption because in it the Supreme Court determined that principles of equity would not be applied to toll § 6511.

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[2] Judge Fernandez noted that several other courts have held that equitable tolling cannot apply to Section 6511. See App., *infra*, 10a-11a, citing *Vintilla* v. *United States*, 931 F.2d 1444, 1446-1447 (11th Cir. 1991); *Webb* v. *United States*, 850 F. Supp. 489, 491-493 (E.D. Va. 1994), aff'd, 66 F.3d 691 (4th Cir. 1995). The majority opinion in *Brockamp* did not address those conflicting decisions.

Judge Fernandez further noted that (*id.* at 13a)

> [a]s *Oropallo*, 994 F.2d at 27, pointed out, in addition to the limitations periods imposed by § 6511(a), subsection (b) of § 6511 places limits on the amount of any refund a claimant may receive. Under § 6511(b)'s provisions, [respondent] would not be able to collect any refund even if her suit were allowed to go forward under subsection (a) because the gap between the time that her father made the payments to the IRS and the time that she filed the refund claim is too great.

B. *United States* v. *Scott*

1. Respondent Nicholas Scott made payments of $30,096 for his 1984 tax liability. In 1989, respondent filed a tax return for 1984 claiming that he had no tax liability for 1984 and requesting a refund of the amounts he had previously paid. The Internal Revenue Service denied the requested refund because it was untimely under Section 6511 of the Code (App., *infra*, 32a).

Respondent then commenced this tax refund suit in federal district court. The court concluded that the doctrine of equitable tolling applies in tax refund suits and that the limitations of Section 6511 should be tolled in this case because respondent "was an alcoholic whose alcoholism rendered him mentally incompetent and unable to file a tax return from January 1985 through November 1989" (App., *infra*, 33a). The court therefore entered judgment for respondent.

2. The court of appeals affirmed, relying wholly upon the decision entered on the same day by the same panel in *United States* v. *Brockamp* (App., *infra*, 33a, 34a).[3] See pages 8-9, *supra*. Judge Fernandez again dissented, for the reasons set forth in his dissent in the *Brockamp* case (App., *infra*, 34a).

REASONS FOR GRANTING THE PETITION

The decisions entered by the Ninth Circuit in *Brockamp* and *Scott* conflict with the decision of the First Circuit in *Oropallo* v. *United States*, 994 F.2d 25 (1993), cert. denied, 114 S. Ct. 705 (1994), of the Fourth Circuit in *Webb* v. *United States*, 66 F.3d 691 (1995), and of the Eleventh Circuit in *Vintilla* v. *United States*, 931 F.2d 1444 (1991). By holding that the doctrine of equitable tolling may be applied to suspend or enlarge the limitations upon tax refund suits established by Congress in Section 6511 of the Internal Revenue Code, the Ninth Circuit decisions have created a conflict among the circuits on a recurring issue of substantial administrative importance.

1. Section 6511(a) of the Internal Revenue Code requires that a refund claim be filed within three years from the filing of the return or within two years from the time the tax was paid. 26 U.S.C. 6511(a). Compliance with that requirement is a condition of the government's waiver of its sovereign immunity. See 26 U.S.C. 7422(a); *United States* v. *Dalm*, 494 U.S. at 608 (citing cases). Moreover, "[i]n addition to the time limitations of Section 6511(a), Section 6511(b) limits the amount of a refund recoverable" on even a *timely* refund claim by specifying that any such recovery is limited to the amount of taxes paid in the three-year period preceding the

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[3] *Brockamp* and *Scott* were consolidated for argument in the Ninth Circuit, and the decisions were entered by the same panel on the same day.

filing of a claim for refund made within three years of the return (26 U.S.C. 6511(b)(2)(A)) or, if no return was filed, the two-year period preceding the filing of the claim (26 U.S.C. 6511(b)(2)(B)) (App., *infra*, 21a).

a. In *Oropallo* v. *United States*, the First Circuit held that these statutory limitations on recovery in tax refund cases "may not be equitably tolled." 994 F.2d at 31. The court noted that Section 6511 contains more than a simple statute of limitations upon the filing of a refund claim (in Section 6511(a)); it also contains, in Section 6511(b), a substantive "limit on [the] amount of credit or refund" that may be paid on even a timely refund claim. 994 F.2d at 30, quoting 26 U.S.C. 6511(b)(2) (caption). The court observed that the substantive limitations on recovery in Section 6511(b) establish "more clearly than a simple limitations period would that Congress intended to establish an outside limit on the recovery of refunds." 994 F.2d at 30 n.7.

The court concluded that, "[b]y imposing an 'outside limit' or 'cut-off' on the amount of taxes which can be recovered, section 6511(b)(2)(A) [establishes] a 'period of repose inconsistent with tolling.'" 994 F.2d at 31, quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991). The court therefore held that the "rebuttable presumption" that equitable tolling may apply to suits against the United States is inapplicable to the limitations on tax refund suits that Congress established in Section 6511. 994 F.2d at 29, citing *Irwin* v. *Department of Veterans Affairs*, 498 U.S. at 95-96.[4]

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[4] In the absence of the substantive limitations on the amount of recoverable taxes under Section 6511(b), the time limitations on the filing of a refund claim under Section 6511(a) would be sufficiently elastic to allow stale claims against the government. For example, a taxpayer theoretically could keep the limitations period of Section 6511(a) open indefinitely simply by reserving a small amount of the tax liability for payment. While the payment of a nominal balance years after the tax was originally due may meet the requirements of the two-year filing period of Section 6511(a), the separate limitations on the *amount* recoverable under Section 6511(b) express a policy of finality and repose that is inconsistent with equitable tolling.

The Ninth Circuit concluded in *Miller* v. *United States*, 38 F.3d 473 (1994), that the three-year rule of Section 6511(a) is unavailable for returns filed more than two years after payment of the taxes at issue. That conclusion is not inconsistent with the analysis of *Oropallo*, as the court of appeals suggested in this case (App., *infra*, 5a-7a n.1). Instead, the Ninth Circuit's opinion in *Miller* dealt with an issue that the First Circuit in *Oropallo* expressly "refused to decide" (38 F.3d at 475 n.1). That issue has no bearing on the analysis adopted by the *Oropallo* court or to the contrary analysis adopted by the Ninth Circuit in this case.

b. In *Webb* v. *United States*, the Fourth Circuit also held that the "rebuttable presumption" of equitable tolling in suits against the government does not apply to tax refund suits. 66 F.3d at 699. *Webb* involved an elderly taxpayer who had been victimized by the fraud of her advisors and whose refund claim was first advanced by the administrator of her estate. The Fourth Circuit noted that, prior to this Court's decision in *Irwin*, "there would seemingly be no question" that equitable tolling was inapplicable to tax refund suits (*id.* at 694):[5]

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[5] Prior to *Irwin*, courts had rejected efforts to apply the doctrine of equitable tolling to tax refund suits. For example, in *Kreiger* v. *United States*, 539 F.2d 317 (3d Cir. 1976), the court stated that application of equitable tolling to tax refund suits would "run[] afoul of the well-established principle that

> Because a statute of limitations is a condition on the government's waiver of sovereign immunity and thus must be "strictly observed," *Block* [v. *North Dakota*, 461 U.S. 273, 287 (1983)], courts have traditionally declined to permit equitable considerations to toll statutes of limitations in cases against the United States. *See, e.g., Soriano v. United States*, 352 U.S. 270 (1957).

After *Irwin* was decided, however, the lower courts have been "divided * * * as to whether the rebuttable presumption of equitable tolling applies in tax refund cases" (66 F.3d at 696).

In *Webb*, the court explained that equitable tolling does not apply to tax refund suits for two essential reasons. First, the court noted that *Irwin* extends the rebuttable presumption of equitable tolling to suits against the government only when such tolling principles were already in place for similar suits against private parties. The court stated that, in *Irwin*, the Court sought to achieve "[e]qual treatment of private and government defendants" by ensuring that equitable tolling applies to suits against the government "*in the same way that it is applicable to private suits*" (66 F.3d at 696-697, quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. at 95 (emphasis added by court of appeals)). The Fourth Circuit explained that, "[u]nlike tort actions or em-ployment disputes, however, tax refund cases cannot be brought against private litigants, nor are they even comparable to suits that can be brought against private litigants" (66 F.3d at 697). Noting

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statutes of limitation applicable to suits against the government are conditions attached to the sovereign's consent to be sued and must be strictly construed." *Id.* at 320.

that taxes "are the life-blood of government" (*id.* at 698, quoting *Bull* v. *United States*, 295 U.S. 247, 259 (1935)), the court concluded that any assumption that equitable tolling should apply to Sections 6511(a) and (b) would not be based upon a realistic assessment of legislative intent. The court therefore held that "*Irwin*'s rebuttable presumption of equitable tolling is not applicable in tax refund suits" (66 F.3d at 699).[6]

Second, the court held in *Webb* that "[e]ven if *Irwin*'s presumption of equitable tolling were applicable in tax refund suits, the taxpayers would still not prevail here because that presumption is, in all events, rebuttable and has effectively been rebutted here" (66 F.3d at 699). In particular, the Fourth Circuit agreed with the analysis of the First Circuit in *Oropallo* that the combined time limitations of Sections 6511(a) and (b) are "inconsistent with equitable tolling" (66 F.3d at 701). The court noted that the substantive limitations on recovery contained in Section 6511(b) serve "as a separate and independent 'time barrier[]' to recovery, * * * a period of repose which itself, standing alone is

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[6] The government contended in *Webb* that this conclusion follows from *United States* v. *Dalm*, 494 U.S. at 602. In *Dalm*, the Court held that the time limitations upon refund claims in Section 6511 of the Internal Revenue Code are jurisdictional and that a failure "to comply with these statutory requirements" bars any claim, whether based on law or equity. *Ibid.* The court of appeals noted in *Webb* that "the holding in *Dalm* is a strong indication by the Supreme Court, almost contemporaneous with the rule announced in *Irwin*, that equity is not to displace the strict time limits set forth in the Internal Revenue Code. * * * Significantly, the Supreme Court's opinion in *Irwin* did not purport to modify *Dalm*; indeed, *Irwin* failed even to mention *Dalm*" (66 F.3d at 698).

'inconsistent with tolling'" (66 F.3d at 700, quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. at 363, and *Oropallo* v. *United States*, 994 F.2d at 30).[7]

c. In *Vintilla* v. *United States*, 931 F.2d at 1446-1447, the Eleventh Circuit also concluded that the doctrine of equitable tolling does not apply to tax refund suits.[8] The court first noted that it had long held that "general principles of equity may not override statutory requirements for timely filing of tax refund claims." *Id.* at 1446, quoting *Republic Petroleum Corp.* v. *United States*, 613 F.2d 518, 527 (5th Cir. 1980), quoting *Kingston Products Corp.* v. *United States*, 368 F.2d 281, 288 (Ct. Cl. 1966). The court stated that its prior decisions were confirmed by this Court's explanation in *Dalm* of "the reasoning behind strict adherence to the limitations period in tax refund suits" (931 F.2d at 1446). See also note 6, *supra*. In particular, the court noted that Section 6511 contains a detailed scheme, with only limited exceptions, that limits recovery against the United States.[9] The court applied the reasoning of this

[7] Judge Russell dissented in *Webb*. In his view, "[l]ike any statute of limitations, § 6511(b)(2) can be equitably tolled in appropriate circumstances" (66 F.3d at 705).

[8] In two subsequent decisions, the Eleventh Circuit declined to reconsider whether equitable tolling applies to tax refund suits because, in those cases, even if equitable tolling *were* applicable, it would not have been available on the facts presented. See *Rosser* v. *United States*, 9 F.3d 1519, 1523 (1993); *First Alabama Bank, N.A.* v. *United States*, 981 F.2d 1226, 1228 (1993).

[9] Section 6511(d) of the Code extends the filing period for claims for refund with respect to specific types of income tax deductions and credits, none of which are involved in these

Court in *Dalm*, where the Court stated that a judicial broadening of the specific statutory exceptions from the limitations of Section 6511 "would be * * * little more than [an] overriding [of] Congress's judgment as to when equity requires that there be an exception to the limitations bar." 931 F.2d at 1446-1447, quoting *United States* v. *Dalm*, 494 U.S. at 610.[10]

d. By contrast with these decisions of the First, Fourth and Eleventh Circuits, the Ninth Circuit held in *Brockamp* and *Scott* that *Irwin* "requires that, in the absence of congressional action, statutes of limitations are, as a general rule, presumed to be subject to equitable tolling in suits against the United States" (App., *infra*, 5a; see *id.* at 33a). Finding no evidence in the text or history of Section 6511 to

cases. See 26 U.S.C. 6511(d) (1988 & Supp. V 1993). Congress has also afforded relief from the limitations periods of Section 6511 in the so-called "mitigation provisions" of the Code, 26 U.S.C. 1311-1314. Those narrowly drawn provisions permit otherwise untimely claims to be advanced in situations involving inconsistent treatment of the same item in separate tax years and in a various other specified contexts. See *ibid.*

[10] In *Vintilla*, the court noted that *Irwin* was decided only nine months after *Dalm* and did not purport to alter, or even address, the conclusion in *Dalm* that equitable principles do not abrogate the requirement of "strict adherence to the limitations period in tax refund suits" (931 F.2d at 1446 & 1447 n.1). The court also observed that *Irwin* had stated that the principles of equitable tolling apply "in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Id.* at 1447 n.1, quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. at 96. The court noted that the taxpayers in *Vintilla* did not assert that they "fit into either of these categories." 931 F.2d at 1447 n.1.

establish "any intention [by Congress] that equitable tolling should not apply to § 6511," the court concluded that the limitations contained in Section 6511(a) and (b) "may be equitably tolled" (App., *infra*, 5a).[11] In so holding, the court expressly disagreed with the contrary analysis and conclusion of the First Circuit in *Oropallo* v. *United States*, 994 F.2d at 29-31. See App., *infra*, 5a-7a n.1; note 4, *supra*.[12]

In dissent, Judge Fernandez stated that he agreed with the analysis adopted by the First Circuit in *Oropallo* and would hold that equitable tolling is inapplicable to tax refund suits under Section 6511(a). He also noted that, under the provisions of Section 6511(b), a taxpayer whose claim is not filed within

[11] The fact that, after *Irwin* was decided, Congress "has done nothing" (App., *infra*, 5a) to resolve whether the doctrine of equitable tolling applies to tax refund statutes does not support the view that equitable tolling applies to those statutes. In *Irwin*, this Court, in adopting a *rebuttable* presumption, obviously did not purport to resolve that issue for every statute and also did not place on Congress the burden of thereafter reviewing the entire United States Code to specify which statutes are, and which are not, subject to equitable tolling. As this Court has observed, "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard* v. *United States*, 328 U.S. 61, 69 (1946). See also *Central Bank* v. *First Interstate Bank*, 114 S. Ct. 1439, 1452-1453 (1994) (rejecting notion that congressional inaction in the face of prior judicial pronouncements is indicative of congressional acquiescence in those prior pronouncements); *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 533-534 (1947) (same).

[12] The court of appeals did not cite its earlier decision in *Capital Tracing, Inc.* v. *United States*, 63 F.3d 859 (1995), which concluded that the doctrine of equitable tolling applies in a wrongful levy suit brought against the government under 26 U.S.C. 7429. In *Webb*, the Fourth Circuit stated that it "d[id] not find *Capital Tracing* persuasive" (66 F.3d at 698 n.3).

three years of her return or within two years of the payment of the tax "would not be able to collect any refund even if her suit were allowed to go forward under [Section 6511(a)]" (App., *infra*, 13a). Judge Fernandez noted that this substantive restriction on the *amount* of refund for a *timely* claim is not subject to the principles of equitable tolling (*id.* at 14a-15a).[13]

[13] Whether viewed as a substantive rule of law limiting the amount of a tax refund, or as a "statute of repose" that is not subject to equitable tolling, Section 6511(b) of the Code expresses a clear intent to restrict the amount of any tax refund to that sum paid within the time periods that Congress specified. This substantive limitation on the "amount" of recovery is not subject to equitable modification by the courts. The doctrine of equitable tolling is confined, by its terms, to statutes of limitations. Suspension of a statute of limitations, historically, could be sought when the plaintiff suffered a legal disability that rendered a timely suit impossible. The disabilities that constituted a basis for tolling were generally limited to conditions such as childhood, insanity and imprisonment. See *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1229-1237 (1950); 2 Wood, *Limitation of Actions* 1069-1217 (4th ed. 1916). In an appropriate case, the doctrine of equitable tolling enables a plaintiff to obtain relief from the strict application of the statutory deadline for bringing his suit or claim. It has not, however, been extended to alter the substantive terms of the statute under which the plaintiff seeks relief. As this Court observed in *Irwin*, it is the "*[t]ime requirements* in lawsuits between private litigants" that are subject to the doctrine of equitable tolling. 498 U.S. at 95 (emphasis added). In each instance that this Court considered the doctrine, that premise has governed. See, *e.g.*, *Burnett* v. *New York Central R.R.*, 380 U.S. 424, 426 (1965); *Honda* v. *Clark*, 386 U.S. 484 (1967); *American Pipe & Con-struction Co.* v. *Utah*, 414 U.S. 538, 558-559 (1974); *Bowen* v. *City of New York*, 476 U.S. 467, 480 (1986). When a statutory condition *other* than a period of limitations for a filing requirement was at stake—such as limits on the *amount* of money recoverable—

2. The conflict among the circuits created by the decision in this case concerns a recurring question of substantial administrative importance. Many taxpayers undoubtedly suffer—or can later be claimed to have suffered—from diminished mental capacity to some degree or another through age, disease, trauma or a multitude of other causes. The decisions of the Ninth Circuit in the present cases provide a manifest opportunity for recurring litigation of factual disputes involving the circumstances that lead to untimely tax refund claims. As the substantial volume of post-*Irwin* decisions concerning claims of equitable tolling in tax refund cases reflects, the legal issue presented in this case has already been the subject of frequent litigation.

In the absence of a decision by this Court resolving the conflict among the courts of appeals, the treatment afforded to taxpayers who claim an equitable tolling of the statutory limitations upon tax refunds will differ based solely upon geographic happenstance. Resolution of this recurring issue is needed to avoid continuing uncertainty and to assure even-handed application of the revenue laws.

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this Court has made clear that equitable tolling does not provide the claimant with relief from the statutory conditions. See *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 27 (1989) (pre-lawsuit notification requirement not subject to equitable tolling).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1996

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 94-56424

D.C. No. CV-93-04601-RSWL

MARIAN BROCKAMP, ADMINISTRATOR AND SOLE RESIDUARY BENEFICIARY OF THE ESTATE OF STANLEY B. MCGILL, DECEASED,
PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Central District of California

[Filed Oct. 5, 1995]

Before FLETCHER, WIGGINS, and FERNANDEZ, Circuit Judges.
Ronald S.W. Lew, District Judge, Presiding.

OPINION

WIGGINS, Circuit Judge:

Marian Brockamp, the administrator and sole beneficiary of the estate of her father, Stanley B. McGill, brought an action for a refund of his April 1984 income tax overpayment. The district court granted summary judgment in favor of the United States, holding that the suit was precluded by the statute of limitations. We reverse and remand for further proceedings on Mr. McGill's mental incompetence.

BACKGROUND

In April 1984, Mr. McGill, who was 93 years old at the time, mailed a check to the Internal Revenue Service ("IRS") for $7,000, along with an application for an automatic extension of time to file his 1983 income tax return. He made no indication of his reason for sending the $7,000. Despite his extension request, Mr. McGill never filed an income tax return for 1983. More than two years later, on July 15, 1986, the IRS transferred the $7,000 from Mr. McGill's account into an "Excess Collection Account."

Mr. McGill died intestate on November 7, 1988 at the age of 98. During the administration of his estate, Mrs. Brockamp discovered the $7,000 payment and requested a refund. In a letter to the IRS, Mrs. Brockamp characterized her father as "senile" and stated that he had mistakenly sent the check for $7,000 rather than $700. On March 27, 1991, Mrs. Brockamp filed a tax return for Mr. McGill's 1983 tax liability. The IRS asessed $427 in taxes, and refused Mrs. Brockamp's refund request, based

on the statute of limitations provided in I.R.C. § 6511.

On August 3, 1993, Mrs. Brockamp filed suit against the United States seeking the return of the money paid by Mr. McGill. She argued that (1) the $7,000 check was a "deposit," rather than a payment, and therefore was not subject to the time limitations of § 6511, and (2) even if the $7,000 was a payment, her refund claim was not barred because the statute of limitations imposed by § 6511 was equitably tolled due to Mr. McGill's mental incompetence. The district court rejected both arguments. It concluded that the $7,000 was a payment, that equitable tolling never applies to tax refund cases, and, therefore, that the claim was barred by the statute of limitations. We conclude that equitable tolling can apply to tax refund cases, and we therefore reverse. We remand to the district court for a determination of Mr. McGill's mental capacity during the relevant time frame.

DISCUSSION

I. STANDARD OF REVIEW

A district court's construction and interpretation of the Internal Revenue Code is reviewed *de novo*. *Miller v. United States*, 38 F.3d 473, 475 (9th Cir. 1994).

II. MERITS

A. Tax Refund Claims are Subject to Equitable Tolling

I.R.C. § 6511(a) provides that a claim for refund of an overpayment must be filed within three years

from the time the return was filed, or, if no return was filed, within two years from the date the tax was paid. The court lacks jurisdiction over a claim that does not satisfy § 6511. *United States v. Dalm*, 494 U.S. 596, 602 (1989). Mrs. Brockamp obviously cannot meet the two year deadline, as the tax was paid in April 1984, and she did not file her refund claim until March 1991. Nor can she meet the three year deadline, because taxpayers who file returns more than two years after their taxes are paid cannot take advantage of the three year period following the filing of a return. *Miller v. United States*, 38 F.3d 473, 475 (9th Cir. 1994). Therefore, § 6511 bars Mrs. Brockamp's claim unless equitable tolling applies to lift that bar.

The government relies on *United States v. Dalm* to support its position that the principles of equitable tolling cannot be applied to § 6511. In *Dalm*, the Supreme Court considered whether equitable recoupment could serve as an independent basis for federal jurisdiction where the statutory requirements of § 6511 were not satisfied. The Court held that the doctrine could not be applied to toll § 6511. *Dalm*, 494 U.S. at 611.

Nine months later, however, in *Irwin v. Veterans Admin.*, 489 U.S. 89 (1990), the Supreme Court declared a new, general rule holding that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so." *Id.* at 95-96 (Title VII action). In *Irwin*, the court changed its method of evaluating the availability of equitable tolling. Specifically, the court stated:

> The continuing effort on our part to decide each case on an ad hoc basis, as we appear to have done in the past, would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress. *We think that this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the government.*

Id. at 95 (emphasis added). We believe that this language effectively limited the *Dalm* decision described above. *Irwin* requires that, in the absence of congressional action, statutes of limitations are, as a general rule, presumed to be subject to equitable tolling in suits against the United States.

Congress has never expressed any intention that equitable tolling should not apply to § 6511. The specific language of the statute does not speak to the application of equitable tolling principles. Additionally, since the Supreme Court decided *Irwin* four years ago, Congress has done nothing to indicate that equitable tolling does not apply to § 6511. Furthermore, as the court in *Johnsen v. United States* noted, the legislative history of § 6511 "is absolutely devoid of any indication that Congress intended to preclude such equitable tolling in tax refund actions." 758 F. Supp. 834, 835-36 (E.D.N.Y. 1991), quoted in *Scott v. United States*, 795 F. Supp. 1028 (D.Haw. 1992). We hold that in the absence of congressional action that indicates to the contrary, the statute of limitations provided in § 6511 may be equitably tolled.[1]

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[1] The Supreme Court, in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991), held that the one-and-three-year structure of §§ 9(e) and 10(b) of the Securities Exchange Act of 1934 was "fundamentally incon-

We think that the facts as alleged by Mrs. Brockamp demonstrate why equitable tolling should apply in some tax cases. In this instance, it would be

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sistent" with the "venerable principle" of equitable tolling, despite acknowledging that time limits are "customarily" subject to such tolling. *Id.* That is, the Court noted that § 9(e)'s one-year provision required only that suit be filed within one year "after the discovery of the facts constituting the violation" and, consequently, set no real limit on when suit could be brought. Therefore, the three-year period also described served as a definitive "cutoff." *Id.* The Court reasoned that this cutoff clearly meant to place an outside limit on the open-ended one-year provision, and was convincing evidence of congressional intent. Accordingly, the Court held that "tolling principles do not apply to that period." *Id.*

The First Circuit subsequently relied upon Lampf in holding that equitable tolling could not apply in tax cases. See *Oropallo v. United States*, 994 F.2d 25 (1st Cir.1993). The *Oropallo* court noted that in the First Circuit, § 6511(a)'s time limitations are "totally illusory." *Id.* at 30. It therefore reasoned that the open-ended § 6511(a) was analogous to the open-ended one-year provision of § 9(e). The court then reasoned that the three-year "cut-off" provision of § 6511(b) was analogous to the three-year provision of § 9(e), in that both were definitive cut-offs meant to close the door on open-ended provisions. *Id.* at 31. Therefore, the court concluded that § 6511, like the Securities Exchange Act, could not be equitably tolled. *Id.* at 29-30.

Our circuit, however, has defined § 6511(a) in such a way that it is not, as it is in the First Circuit, an open-ended provision analagous to § 9(e):

> A two-year period for filing a claim is mandated by section 6511(a) in this case.
>
> . . . .
>
> To hold that the filing of a return more than two years after payment of taxes invokes the three-year period of § 6511(a) would reward strategic behavior on the part of the taxpayers and create a discrepancy in limitations

unconscionable to allow the government to retain money that it concedes it was not owed, and may have only received due to a 93 year-old man's senility. We find *Irwin* to be controlling and hold that, in the absence of congressional action, the principle of equitable tolling applies to tax refund claims.

B. Mental Incompetence Tolls the Statute of Limitations

In a prior case, we expressly left open the question of whether mental incompetence can toll a statute of limitations. *See Atkins v. Union Pac. R.R.*, 685 F.2d 1146, 1148 (9th Cir. 1982). We have held, however, that where "extraordinary circumstances beyond plaintiffs' control [make] it impossible to file the claims on time," equitable tolling applies. *Seattle Audubon Soc'y v. Robertson*, 931 F.2d 590, 595 (9th Cir. 1991). Recently, several post-*Irwin* courts have held that mental incompetence will toll statutes of limitation in suits against the government. *See, e.g., Nunnally v. MacCausland*, 996 F.2d 1, 4-5 (1st Cir. 1993); *Wiltgen v. United States*, 813 F. Supp. 1387, 1394-95 (N.D. Iowa 1992); *Johnsen v. United States*, 758 F. Supp. 834, 835-36 (E.D.N.Y. 1991). We now

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> periods that was not intended by the Internal Revenue Code.

Miller, 38 F.3d at 475-76. Because in this circuit § 6511(a)'s time limitation is not, as it is in the First Circuit, "totally illusory," § 6511(b) is not analogous to the three-year provision of § 9(e), either. In this circuit § 6511(b) does not close the door on an open-ended provision, as it does in the First Circuit. Because in this circuit § 6511(a) and (b) are not analagous to the one- and three-year provisions of § 9(e), we are not constrained, as was Oropallo, to conclude that *Lampf* precludes equitable tolling in tax cases.

join those courts and hold that mental incompetence constitutes a ground for equitable tolling. Principles of equity mandate that when mental incompetence precludes a person from asserting his rights during the proper time perod, he should not be precluded from later seeking redress for his injuries.

Viewing the facts of this case in the light most favorable to Mrs. Brockamp, there is a triable issue of fact as to Mr. McGill's mental incompetence. If Mr. McGill is found to have been mentally incompetent when he made the overpayment, tolling will allow Mrs. Brockamp to satisfy the statute of limitations provided in § 6511.

CONCLUSION

We hold that equitable tolling principles apply to tax refund cases. Further, we hold that mental incompetence can be a ground for tolling a statute of limitations. Accordingly, we reverse the district court's grant of summary judgment in favor of the government, and remand for further proceedings regarding Mr. McGill's mental competency.

FERNANDEZ, Circuit Judge, dissenting:

Under 26 U.S.C. §6511(a), Brockamp's claim for a refund of her father's 1983 taxes was untimely. *See Miller v. United States*, 38 F.3d 473, (9th Cir. 1994). Brockamp argues that even so the doctrine of equitable tolling should operate to relieve her from the time limitations of § 6511.[1]

[1] Another serious issue lurks in this case. Brockamp asserts that the amount paid to the government was a "deposit" rather than a "payment." Because the issue is not addressed by the majority and need not be, there is no reason for me to spill ink over it.

The Supreme Court has held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Irwin v. Veterans Admin.*, 498 U.S. 89, 95-96, 111 S. Ct. 453, 457, 112 L. Ed. 2d 435 (1990) (Title VII action). At the same time, the Court has recognized that equitable tolling is traditionally extended only "sparingly," in two limited circumstances not at issue here.[2] *Id.* at 96, 111 S. Ct. at 457-58; *see also Scholar v. Pacific Bell*, 963 F.2d 264, 267-68 (9th Cir.) (noting that equitable tolling is available in "extreme cases" and has been applied "sparingly"), *cert. denied*, ——U.S. ——, 113 S. Ct. 196, 121 L. Ed. 2d 139 (1992).

Sparing or not, the principles of equitable tolling cannot be applied to § 6511. In *United States v. Dalm*, 494 U.S. 596, 110 S. Ct. 1361, 108 L. Ed. 2d 548 (1990), decided nine months before *Irwin*, the Supreme Court held that the doctrine of equitable recoupment could not be applied to toll § 6511. The Court was not willing to allow that equitable doctrine to, in effect, extend the time that a taxpayer would have to apply for a refund of taxes. It approvingly pointed out that in the earlier case of *Bull v. United States*, 295 U.S. 247, 259, 55 S. Ct. 695, 699, 79 L. Ed. 1421 (1935), it had made it clear that even reliance on an inconsistent assessment by the Commissioner would not serve to "toll the statute

[2] Those circumstances are "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Id.* at 96, 111 S. Ct. at 458 (footnotes omitted).

of limitations." 494 U.S. at 607, 110 S. Ct. at 1367. If the equitable recoupment principle was to apply at all, it had to be on a ground other than tolling.

The Court's holding applies with equal force to the present attempt to toll the statute of limitations on equitable grounds. Here, as there, the jurisdictional bar of § 6511 would have to be lifted. *See id.* at 608, 110 S. Ct. at 1368. As the Court said, "unless a claim for refund of a tax has been filed within the time limits imposed by § 6511(a), a suit for refund, regardless of whether the tax is alleged to have been 'erroneously,' 'illegally,' or 'wrongfully collected,' may not be maintained in any court." *Id.* at 602, 110 S. Ct. at 1365 (citations omitted). Moreover, *Dalm* was an appealing taxpayer. She had not failed to pay her taxes or to file a return. But she was going to be required to pay twice. That was after the government had even assessed penalties and interest with respect to the gift taxes that it nearly conceded need not have been paid at all because what it really wanted was income taxes for the transaction. As the dissent said, the Court, in effect, held that the statute of limitations could not be tolled "by Government conduct that [the] Court [had] censured as 'immoral' and tantamount to 'a fraud on the taxpayer's rights.'" *Id.* at 612, 110 S. Ct. at 1370 (Stevens, J., dissenting); see also *Kolom v. United States*, 791 F.2d 762, 768 (9th Cir. 1986).

Thus, although *Irwin* creates a rebuttable presumption of equitable tolling in most areas, *Dalm* effectively rebuts that presumption because in it the Supreme Court determined that principles of equity would not be applied to toll § 6511. Other courts have recognized that. *See, e.g., Vintilla v. United States*, 931 F.2d 1444, 1446-47 & n.1 (11th Cir. 1991) (holding that, together, *Irwin* and *Dalm* bar equitable tolling of § 6511(a)); *Webb v. United States*, 850 F. Supp. 489, 491-93 (E.D.Va. 1994) (invoking *Dalm* and *Irwin* to hold that equitable tolling is inapplicable in tax refund cases).[3]

A different approach was taken in *Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993) (per curiam), *cert. denied*, —— U.S. ——, 114 S. Ct. 705, 126 L. Ed. 2d 671 (1994). The First Circuit held that the provisions of § 6511 cannot be equitably tolled, but it arrived at that conclusion by analogizing § 6511 to the provisions of the Securities Exchange Act of 1934 at issue in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991). Even though under *Irwin* a rebuttable presumption of equitable tolling applied, the Court in *Lampf* held that the structure of the statutes at issue made clear that Congress intended to foreclose resort to equity to stretch the statutes' time limitations. *Lampf*, 501 U.S. at 363-64, 111 S. Ct. at 2782.

In *Oropallo*, the First Circuit rested upon an analogy to *Lampf* instead of an analysis of *Dalm* because it believed that *Irwin* had "changed [the Supreme Court's] approach to the issue of equitable tolling in suits against the government" from what it had been at the time of *Dalm*. 994 F.2d at 29. *Lampf*, according to *Oropallo*, "altered" "the relevant analysis" yet again. *Id.*

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[3] But see *First Interstate Bank v. United States*, 874 F. Supp. 286 (D. Nev. 1994) (appeal pending); *Wiltgen v. United States*, 813 F. Supp. 1387 (N.D. Iowa 1992); *Johnsen v. United States*, 758 F. Supp. 834 (E.D.N.Y. 1991), in which the courts held that under *Irwin*, equitable tolling applies to § 6511(a).

However, given that the three cases were decided within thirteen months of each other, I believe that they should be read together if they can be reconciled.[4] *Lampf* expressly recognizes the rebuttable presumption principle of Irwin but holds that "the equitable tolling doctrine is fundamentally inconsistent" with the provisions of the Securities Exchange Act at issue. 501 U.S. at 363, 111 S. Ct. at 2782. Thus, *Lampf* and *Irwin* are compatible. Likewise, *Lampf*, *Irwin* and *Dalm* can be reconciled. Although *Dalm* does not use rebuttable presumption language, it recognizes, as was the case with the statutes in *Lampf* and their raison d'etre, that equitable tolling principles are inconsistent with the foundational underpinnings of the Internal Revenue Code. See *Webb*, 850 F. Supp. at 492 (applying *Dalm* broadly). That is because tax laws are "technical laws which are not subject to general principles of equity." *Oropallo*, 994 F.2d at 28 n.3 (citing *Lewyt Corp. v. Commissioner*, 349 U.S. 237, 249, 75 S. Ct. 736, 744, 99 L. Ed. 1029 (1955), and *Ewing v. United States*, 914 F.2d 499, 501 (4th Cir. 1990), *cert. denied*, 500 U.S. 905, 111 S. Ct. 1683, 114 L. Ed. 2d 78 (1991)).

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[4] The view that *Irwin* and *Dalm* complement each other—as opposed to the assumption in *Oropallo* that *Irwin* superseded *Dalm*—is also supported by the fact that in *Dalm*, Chief Justice Rehnquist and Justices Kennedy, White, Blackmun, O'Connor, and Scalia were in the majority, while Justices Stevens, Marshall and Brennan dissented. In *Irwin*, Justice Marshall joined the majority (in a concurrence), Justice Stevens again dissented, and Justice Souter, who had replaced Justice Brennan, did not take part in the decision. For *Irwin* to truly have been intended to render *Dalm* obsolete (an unlikely proposition particularly given that *Irwin* makes no mention of *Dalm*), six justices would have had to have changed their positions in the space of nine months.

Finally, when Congress has included specific exceptions in a statute of limitations, we should not readily read additional ones into it. See *Rylewicz v. Beaton Servs., Ltd.*, 888 F.2d 1175, 1181 (7th Cir. 1989) (holding [pre-*Irwin*] that equitable tolling cannot apply to the Fair Credit Reporting Act because Congress explicitly delineated certain exceptions to its statute of limitations, equitable tolling not among them); cf. *Dalm*, 494 U.S. at 610, 110 S. Ct. at 1369; *Parks Sch. of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Section 6511(c) contains an exception to the limitations period for those who negotiate an agreement for an extension of time with the IRS. Moreover, §§ 1311-1314 contain certain narrow "mitigation provisions" that extend the limitations period in some circumstances. Because Congress has specifically provided exceptions to the time requirements of subsections 6511(a) and (b), we should be chary of reading others into them, including equitable tolling.

In short, because, as recognized by the Supreme Court in *Dalm*, equitable principles are inconsistent with the statutory scheme of the Internal Revenue Code, I need not resort to a *Lampf*-style analysis in order to conclude that the district court should be affirmed. Nonetheless, *Oropallo's* elucidation of §6511 compared with the statutes at issue in *Lampf* does provide further support for my conclusion.

As *Oropallo*, 994 F.2d at 27, pointed out, in addition to the limitations periods imposed by § 6511(a), subsection (b) of § 6511 places limits on the amount of any refund a claimant may receive. Under § 6511 (b)'s provisions, Brockamp would not be able to collect any refund even if her suit were allowed to go forward under subsection (a) because the gap

between the time that her father made the payments to the IRS and the time that she filed the refund claim is too great.

Brockamp argues, however, that equitable tolling should also be applied to § 6511(b), which would then allow her to collect the full amount of the refund that she claims she is owed. *Oropallo*, 994 F.2d at 30, likened the interaction of subsections 6511(a) and (b) to the "1-and-3-year-structure" of the provisions at issue in *Lampf*, which required that an action under the Securities Exchange Act be brought within one year after the discovery of facts constituting the cause of action and in no event later than three years after the accrual of the cause of action. See 15 U.S.C. § 78i(e). The three-year provision in *Lampf* was found by the Court to be "a period of repose inconsistent with tolling." 501 U.S. at 363, 111 S. Ct. at 2782. As *Oropallo* recognized, the provisions of § 6511(b) also operate as a period of repose and impose an outside limit on recovery. See generally *Oropallo*, 994 F.2d at 28-31. The provisions of § 6511(b) were intended by Congress "to prevent a taxpayer from extending the time for filing a claim for the entire tax by making small payments from time to time." *Snyder v. United States*, 616 F.2d 1187, 1188 (10th Cir. 1980) (emphasis added) (citing S. Rep. No. 398, 68th Cong., 1st Sess. 33 (1924)). In other words, even though the subsection "clearly operates like a statute of limitations," it more clearly imposes a period of repose so that the government may finally have closure as to particular tax returns. *Oropallo*, 994 F.2d at 30 n.7. I cannot say it better than the Court did in *Rothensies v. Electric Battery Co.*, 329 U.S. 296, 301, 67 S. Ct. 271, 273, 91 L. Ed. 296 (1946):

> It probably would be all but intolerable, at least Congress has regarded it as ill-advised, to have an income tax system under which there would never come a day of final settlement and which required both the taxpayer and the Government to stand ready forever and a day to produce vouchers, prove events, establish values and recall details of all that goes into an income tax contest. Hence a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy.

Brockamp presents the appealing argument that her aged father mistakenly remitted way too much money when he applied for an extension of time to file his income tax return for 1983. Basically, she argues that it is unfair to apply the statute of limitations to her. It is true that every statute of limitations has at least a tinge of unfairness because it can preclude the collection of past debts and the assertion of just claims against a person who *should* give the plaintiff recompense. That is why in a somewhat gentler era than ours Hoffman wrote, "I will never plead the Statute of Limitations when based on the mere efflux of time; for if my client is conscious that he owes the debt, and has no other defense than the legal bar, he shall never make me a partner in his Knavery." 2 David Hoffman, A Course of Legal Study 751 Resolution XII (2d ed. 1836). Thus, I am not unsympathetic.

However, in the Internal Revenue Code Congress has attempted to create a tesselated scheme which assures that the government will receive needed revenues and that those receipts can, after a time, be

counted upon as it supplies services to the nation. Considering the complexity of the design, perfection cannot be expected. Considering the vast extent of the design and the numbers of people affected by it, the special thoughts, intentions, needs, and circumstances of each taxpayer cannot always be accommodated. So it is here.

Therefore, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT CALIFORNIA

No. CV 93-4601-RSWL (Sx)

MARIAN BROCKAMP, ADMINISTRATOR AND SOLE RESIDUARY BENEFICIARY OF THE ESTATE OF STANLEY B. MCGILL,
PLAINTIFF

v.

UNITED STATES OF AMERICA,
DEFENDANT

[Filed July 26, 1994]

ORDER

LEW, District Judge.

Plaintiff Marian Brockamp and Defendant United States of America each move for summary judgment regarding Plaintiff's action for recovery of a federal income tax refund. The central issue in this case is whether the doctrine of equitable tolling applies to tax refund cases. After reviewing the arguments presented by both parties, this Court holds that equitable tolling does not apply in Plaintiff's case. Accord-

ingly, Plaintiff's motion for summary judgment is DENIED and Defendant's motion for summary judgment is GRANTED.

I. BACKGROUND

Plaintiff, Marian Brockamp, is the administrator and sole beneficiary of the estate of her father, Stanley B. McGill. On or about April 15, 1984, Stanley McGill mailed to the Internal Revenue Service (IRS) a check for $7,000 accompanied by an application for automatic extension of time (Form 4868) to file his 1983 income tax return. At the time, Mr. McGill was 93 years old and, according to Plaintiff, "mentally deranged."[1] Mr. McGill did not indicate on the check or elsewhere the purpose of the $7,000 check. Despite Mr. McGill's request for an extension of time, he never filed an income tax return for the 1983 taxable year.[2] On July 15, 1986, more than two years after receiving the $7,000 check, the IRS transferred the funds from Mr. McGill's account into an "Excess Collection Account."

Mr. McGill died intestate on November 7, 1988 at the age of 98. His daughter, Plaintiff Marian Brockamp, was appointed administrator of his estate on January 4, 1989. During the administration of the estate, Mrs. Brockamp discovered the $7,000 payment to the IRS and subsequently requested a refund.

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[1] In a letter to the IRS. Plaintiff also characterized Mr. McGill as "senile."

[2] Because Mr. McGill did not file a return or another request for an extension of time, the IRS sent him delinquency notices on December 15, 1984 and February 18, 1985. There is no indication in the record that Mr. McGill responded to these notices.

In a handwritten letter dated March 13, 1991, Mrs. Brockamp asked the IRS to refund the money because her father had been senile and had mistakenly sent a check for $7,000 instead of $700. On March 27, 1991, Mrs. Brockamp also filed a tax return for Mr. McGill's 1983 tax liability and the IRS assessed $427.00 in taxes. On August 8, 1991, the IRS rejected Mrs. Brockamp's request for a refund. The IRS stated that she was not entitled to a refund because the $7,000 payment was made more than three years prior to her claim.

On August 3, 1993, Mrs. Brockamp filed suit against the United States seeking return of the funds paid to the IRS by Mr. McGill. Plaintiff moves for summary judgment against the United States by arguing that the $7,000 check was a deposit as a matter of law and should be returned to Mr. McGill's estate. Defendant, however, argues that the check was not a deposit but a payment and the applicable statute of limitations had run when Mrs. Brockamp filed a claim for a refund. In addition, Defendant contends that because the statute of limitations for Plaintiff's claim has expired and the doctrine of equitable tolling does not apply in this type of case, the Court must grant its own motion for summary judgment.

II. DISCUSSION

A. SUMMARY JUDGMENT

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a mater of law. Fed. R.Civ.P. 56. Where the moving party does not have the burden of proof at trial on a dispositive issue, the moving party may meet its burden for summary

judgment by showing an "absence of evidence" to support the non-moving party's case. *Celotex v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). The non-moving party, on the other hand, is required by FRCP 56(e) to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Id.* at 324, 106 S.Ct. at 2553. The non-moving party can meet this requirement by presenting affidavits, depositions, answers to interrogatories or admissions on file. *Id.* Conclusory allegations unsupported by factual allegations, however, are insufficient to create a triable issue of fact so as to preclude summary judgment. *Exxon Corp. v. Fed. Trade Comm'n*, 663 F.2d 120, 127 (D.C.Cir.1980). Furthermore, a non-moving party who has the burden of proof at trial must present enough evidence that a "fair-minded jury could return a verdict for the (opposing party) on the evidence presented." *Anderson v. Liberty Lobby*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986).

B. JURISDICTION AND 26 U.S.C. § 6511

Federal district courts have jurisdiction over suits against the United States "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected. . . . ." 28 U.S.C. § 1346(a)(1). A district court may not entertain a suit, however, unless "a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." 26 U.S.C. §7422(a); *see also Miller v. United States*, 949 F.2d 708, 712 (4th Cir.1991) (stating that jurisdictional prerequisite is not waivable by the government). Most importantly, under 26 U.S.C. § 6511(a) a refund claim must be filed within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. 26 U.S.C. § 6511(a). Thus, Section 6511(a) distinguishes between taxpayers who file returns and those who do not. *See Oropallo v. United States*, 994 F.2d 25, 26 (1st Cir.1993), *cert. denied*, —— U.S. ——, 114 S.Ct. 705, 126 L.Ed.2d 671 (1994). Taxpayers who file returns have three years from the time they filed their return or two years from the time they paid their taxes to claim a refund. Taxpayers who have not filed returns, on the other hand, must file a claim for refund within two years of the alleged overpayment. *See* 26 U.S.C. § 6511(a); *Oropallo*, 994 F.2d at 26. A refund cause of action must be timely filed under one of the limitations periods in Section 6511(a) for the district court to obtain jurisdiction over the suit. *See United States v. Dalm*, 494 U.S. 596, 607, 110 S.Ct. 1361, 1368, 108 L.Ed.2d 548.

In addition to the time limitations of Section 6511(a), Section 6511(b) limits the amount of a refund recoverable by a claimant. Specifically, if a person files a timely claim within the three-year period mentioned in Section 6511(a), the amount of a refund is limited to

> the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return.

26 U.S.C. § 6511(b)(2)(A). If, however, a claim was not timely filed within the three-year period mentioned in Section 6511(a), the amount of

> refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

26 U.S.C. § 6511(b)(2)(B). Thus, if a claim was filed within three years of filing a return, Section 6511(b) explicitly forecloses any refund of taxes not paid within the three-year period preceding the date the claim for refund was filed. Section 6511(b) establishes an additional limitations period separate from the three-year time limitation period in Section 6511(a). *See Oropallo*, 994 F.2d at 27; *see also Mills v. United States*, 805 F.Supp. 448, 450 (E.D.Tex. 1992). In addition, if a return was not filed within the three-year period described in Section 6511(a), Section 6511(b) specifically precludes the refund of payments made before the two years preceding the date of the claim for refund. If, however, the remittance is not considered a "payment," the restrictions mandated under Sections 6511(a) and 6511(b)(2) do not apply.

C. WHETHER MR. MCGILL'S CHECK WAS A PAYMENT OR DEPOSIT

Plaintiff contends that the $7,000 check sent to the IRS is a "deposit" and is therefore not subject to the limitations period codified in Section 6511(a). Primarily, Plaintiff argues that because the IRS never made an assessment of the taxes owed by Mr. McGill, the $7,000 check was treated as a deposit and is not subject to Section 6511(a). Plaintiff's argument, however, is unavailing. Although the mere transfer

of money by a taxpayer is insufficient to classify the remittance as a payment, *see United States v. Dubuque Packing Co.*, 233 F.2d 453, 459 (8th Cir.1956) ("not every transfer of money by a taxpayer to a Federal tax authority will constitute a 'payment' . . . Some further act is necessary"), Mr. McGill's check was accompanied by an application for extension of time to file his 1983 tax return. Absent a designation by the taxpayer, a remittance with an application for extension of time to file a return is deemed a payment. See 26 U.S.C. § 6151(a) ("Except as otherwise provided . . . when a return of tax is required . . ." the taxpayer shall "pay such tax . . . at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return)."); *Ehle v. United States*, 720 F.2d 1096, 1097 (9th Cir.1983); *Rose v. United States*, 256 F.2d 223, 226 (3d Cir.1958). In *England v. United States*, 760 F.Supp. 186 (D.Kan.1991), the court held that as a matter of law, remittances accompanied with an IRS Form 4868 application for extension are payments of estimated tax which are subject to the statute of limitations under Section 6511(a). *But see Risman v. Comm'r of Internal Revenue*, 100 T.C. 191, 199, 1993 WL 72856 (U.S.T.C.1993) (criticizing holding in *England* that filing of Form 4868 with remittance is automatically deemed an estimated payment). Similarly, in the present case Mr. McGill mailed a check for $7,000 accompanied with an application for a filing extension. There is no evidence that the check was intended as a deposit. Under the applicable IRS regulations, Mr. McGill was required to submit an estimated tax payment in order to avoid subsequent penalties. Thus, as the court in *England* held, the remittance of a check along with a request

for an extension of time is deemed a payment as a matter of law.

D. WHETHER THE DOCTRINE OF EQUITABLE TOLLING APPLIES TO PLAINTIFF'S CASE

As stated previously, a taxpayer must file a claim for refund with the IRS within three years of the date the return is filed or within two years of the date the tax is paid, whichever is later. 26 U.S.C. § 6511(a). In the present case, Mr. McGill sent the $7,000 check on or about April 15, 1984. Plaintiff then filed a refund claim nearly seven years later on March 13, 1991. Thus, Plaintiff's claim for refund was untimely because it was filed more than two years after the alleged overpayment was made by Mr. McGill.[3]

Although her claim was untimely, Plaintiff argues that the statute of limitations imposed by Section 6511(a) was equitably tolled because of Mr. McGill's mental incapacity. Defendant, however, contends that the prevailing case authority holds that equitable tolling is not applicable to tax refund cases and therefore Plaintiff's claim is barred by the statute of limitations. Accordingly, Defendant contends that

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[3] At the time Plaintiff had filed the claim for refund, the IRS had not received a return for Mr. McGill's 1983 taxable year. Plaintiff submitted a return several days after making a claim for refund on March 27, 1991. Thus, the applicable time period under Section 6511(a) is the two year limitation for taxpayers who have not filed a tax return. Nevertheless, if the court were to find the late filing of Mr. McGill's tax return as the operative date Section 6511(b) would still preclude any recovery by Plaintiff.

this Court is without subject matter jurisdiction over Plaintiff's claim for a refund.

In support of the position that equitable tolling is applicable to her case, Plaintiff primarily relies on the Supreme Court's decision in *Irwin v. Veterans Affairs*, 498 U.S. 89, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990). In *Irwin*, the Supreme Court recognized that the courts have traditionally declined to apply equitable principles in cases against the government because waivers of sovereign immunity are to be strictly construed.[4] *Irwin*, 498 U.S. at 96-99, 111 S.Ct. at 458-59; *see Oropallo*, 994 F.2d at 28; *see, e.g., Ellis v. United States*, 229 Ct.Cl. 814 (1982); *Stepka v. United States*, 196 F.Supp. 184, 185 (E.D.N.Y.1961). The Court in *Irwin*, however, changed its approach to the issue of equitable tolling against the government and held that

> the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.

Irwin, 498 U.S. at 95-96, 111 S.Ct. at 457. Consequently, the Court in *Irwin* adopted "a more general rule to govern the applicability of equitable tolling in suits against the Government." *Id.*

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[4] The Supreme Court granted certiorari "to determine when the 30-day period under [42 U.S.C. § 2000e-16(c)] begins to run and to resolve the Circuit conflict over whether late-filed claims [under § 2000e-16(c)] are jurisdictionally barred." *Irwin*, 498 U.S. at 92, 111 S.Ct. at 455. Thus, unlike the present case, the case in *Irwin* involved a Title VII discrimination suit.

By relying on *Irwin*, several lower courts have extended the doctrine of equitable tolling to tax refund cases. For example, in *Scott v. United States*, 795 F.Supp. 1028 (D.Haw.1992), the plaintiff filed a tax refund suit after the IRS denied his request for a refund. The IRS asserted that the claim was untimely under 26 U.S.C. § 6511. *Id.* at 1030. The plaintiff conceded that the refund claim was untimely but argued that his mental incompetency equitably tolled the statute of limitations. *Id.* The government moved to dismiss the plaintiff's cause of action by arguing that the court lacked subject matter jurisdiction over the case. *Id.* The district court, however, denied the government's motion and found that "[t]he Irwin Court recognized that the statute of limitations may be equitably tolled even where the statute of limitations is a prerequisite to federal court jurisdiction. . . ." *Id.* at 1031. Noting that Irwin involved an untimely Title VII claim, the court in Scott nevertheless held that "the reasoning in [Irwin] applies with equal force to untimely tax claims." *Id.* at 1031.

In addition to the district court's decision in Scott, several other lower courts have extended the doctrine of equitable tolling to tax cases. *See, e.g., First Alabama Bank v. United States*, 981 F.2d 1226, 1228 (11th Cir.1993) (assuming under Irwin that "the statute of limitations governing tax refund suits . . . may under some circumstances be equitably tolled"); *Wiltgen v. United States*, 813 F.Supp. 1387 (N.D. Iowa 1992) (relying on *Irwin* in applying equitable tolling to tax refund claim); *Johnsen v. United States*, 758 F.Supp. 834, 835 (E.D.N.Y.1991) (same). Plaintiff relies on the Supreme Court's state-

ment in Irwin and the post-*Irwin* cases extending the equitable tolling doctrine to tax cases in opposition to Defendant's motion for summary judgment. Despite these cases, however, the more recent weight of authority rejects the application of equitable tolling in tax refund cases.

E. Oropallo v. United States

In *Oropallo* v. *United States*, 994 F.2d 25 (1st Cir.1993), *cert. denied*, —— U.S. ——, 114 S.Ct. 705, 126 L.Ed.2d 671 (1994), the First Circuit conducted a thorough analysis of whether equitable tolling applies to tax refund claims in light of Irwin and the Supreme Court's more recent decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991). Recognizing that *Irwin* extended equitable principles to cases against the government, the First Circuit concluded that the Supreme Court's decision in *Lampf*, rejecting equitable tolling for suits under the securities laws, altered the Court's analysis. *Oropallo*, 994 F.2d at 30-31. The Court in *Oropallo* found that the limitations imposed by Sections 6511 (a) and (b) are fundamentally inconsistent with the doctrine of equitable tolling. *Id.* Consequently, *Oropallo* held that Section 6511(a), which limits refunds recoverable to the amount of tax paid in the three-year period immediately preceding the filing of a claim, may not be equitably tolled. *Id.* at 28.

In *Oropallo*, a taxpayer discovered he had overpaid his taxes by $698.00 and sought a refund nearly 8 years later, which the IRS rejected as untimely. *Id.* at 25. The taxpayer filed suit against the government, arguing that the limitations period of Section

6511 should be equitably tolled due to his incarceration and alleged carbon monoxide poisoning, which rendered him incapacitated for several years subsequent to the tax overpayment. *Id.* The Court of Appeals, however, rejected his claim, stating that "the three-year period in section 6511(a) gives the taxpayer ample time to file a refund claim, and there is no need to toll that period." *Id.* at 30. The court further found that, except in clearly unique situations which did not apply here, the limitations period in Section 6511 have not been equitably tolled. *Id.* at 28. The time limitation of Section 6511 is 'inflexible' and so not tolled by the taxpayer's mental incompetency; there are only 'rare exceptions' to the 'rigid prevailing rule[] that such statutes of limitations cannot be extended in any circumstances,' *e.g.*, the prisoner of war or fraud situation. *Id.* (*quoting Stepka v. United States*, 196 F.Supp. 184, 185 (E.D.N.Y.1961) (finding that no exception to the time limit should be made because of mental incompetency)).

Oropallo is similar to the present case. Here, Plaintiff discovered the tax over-payment and sought a refund seven years later. Like the plaintiff in *Oropallo*, Plaintiff here argues equitable tolling should apply given her fathers incapacitation. Plaintiff's argument that her father was "mentally deranged and senile, however, fails to meet the "clearly unique exception which may allow equitable tolling to apply. *Oropallo*, 994 F.2d at 28.

F. Dalm v. United States

In *United States v. Dalm*, 494 U.S. 596, 110 S.Ct. 1361, 108 L.Ed.2d 548 (1990), the Supreme Court

considered the issue of whether the doctrine of equitable tolling provided a jurisdictional basis for independent suits to recover a gift tax refund, after the time for filing had expired. Holding that the district court lacked jurisdiction over the refund suit, the court stated:

> [U]nless a claim for refund of a tax has been filed within the time limits imposed by § 6511(a), a suit for refund, regardless of whether the tax is alleged to have been 'erroneously,' 'illegally,' or 'wrongfully collected' . . . may not be maintained in any court.

Id. at 602, 110 S.Ct. at 1365 (citing *United States v. Kales*, 314 U.S. 186, 193, 62 S.Ct. 214, 217, 86 L.Ed. 132 (1941)). The fact that a taxpayer does not learn until after the limitations period has run that the tax was paid in error, and that he or she has ground upon which to claim a refund, does not operate to lift the limitations bar. *Dalm*, 494 U.S. at 607-11, 110 S.Ct. at 1367-69. The court stated: "were we to allow her to maintain a suit for refund on the basis of equitable recoupment, we would be doing little more than overriding Congress' judgment as to when equity requires that there be an exception to the limitations bar." *Id.* at 610, 110 S.Ct. at 1369.

The present case is also similar to *Dalm*, where a taxpayer sought a gift tax refund seven years later, even though she was required to file her claim within three years of when the original return was filed. In rejecting her claim, the Supreme Court found that the doctrine of equitable recoupment will not provide jurisdictional basis for independent suits against the Government, after the time for filing a

refund claim has expired. *Id.* at 604-07, 110 S.Ct. at 1365-67. Applying the Court's analysis in *Oropallo* and *Dalm* to the present case, this Court holds that the doctrine of equitable tolling is inapplicable and summary judgment in favor of Defendant is appropriate. Accordingly, the Court hereby GRANTS Defendant's motion for summary judgment and DENIES Plaintiff's motion for summary judgment.

The Court hereby incorporates Defendant's Statement of Uncontroverted Facts and Conclusions of Law.

IT IS SO ORDERED.

APPENDIX C

[Filed Oct. 5, 1995]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-15321

D.C. No. CV-92-00011-ACK

NICHOLAS T. SCOTT, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

No. 94-15323

D.C. No. CV-92-00011-ACK

NICHOLAS T. SCOTT,
PLAINTIFF-APPELLEE/CROSS-APPELLANT

v.

UNITED STATES OF AMERICA;
IRS, Director,
DEFENDANTS-APPELLANTS/CROSS-APPELLEES

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Argued and Submitted June 5, 1995
Pasadena, California

MEMORANDUM *

Before: FLETCHER, WIGGINS, FERNANDEZ, Circuit Judges

BACKGROUND

In the early 1980s, Nicholas Scott began to experience severe difficulties resulting from his alcohol abuse, including multiple citations for driving under the influence of alcohol and the loss of his job. He turned over power of attorney for his financial affairs to his father. In 1984, pursuant to the power of attorney, Mr. Scott's father made a number of federal tax deposits on Mr. Scott's behalf. Then, after Mr. Scott revoked the power of attorney, he himself made a final estimated tax payment in January 1985. Altogether, the payments made toward Mr. Scott's 1984 taxes totaled $30,096. In actuality, Mr. Scott had no tax liability that year.

Mr. Scott filed tax returns for the 1984-88 tax years on November 29, 1989 and claimed a refund of $30,096 plus interest. The Internal Revenue Service ("IRS") disallowed Mr. Scott's refund claim due to the expiration of the statute of limitations for filing a claim based on 26 U.S.C. § 6511. Mr. Scott subsequently filed the present action.

The district court made two key holdings in this case. Assuming that Mr. Scott's request for a refund was barred by the statute of limitations contained in the tax code, the court first ruled that equitable tolling principles can apply to tax cases.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

The district court then held that a taxpayer's mental incompetence could operate to toll the limitations period for a tax refund claim during the time the taxpayer was mentally incompetent. Accordingly, the district court proceeded to a bench trial to determine Mr. Scott's competence.

At the bench trial, expert witnesses on behalf of both the government and Mr. Scott testified that alcoholism is a disease than can lead to mental incompetence. The district court resultantly found that Scott was an alcoholic whose alcoholism rendered him mentally incompetent and unable to file a tax return from January 1985 through November 1989. The court thus ruled that the statute of limitations did not bar Scott's claim for the $30,096 refund. The Government appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

DISCUSSION

In a similar case, argued before us at the same time as this one, we held that equitable tolling can apply to tax cases, and that mental incompetence can provide a ground for such tolling. *See Brockamp v. United States*, No. 94-56424, slip op. —— (9th Cir. Oct. 5, 1995). Accordingly, these two holdings of the district court are affirmed.

As to the district court's factual finding that Mr. Scott was mentally incompetent during the relevant period, this finding was well supported. The district court noted that the determination whether a particular taxpayer suffers from severe enough alcoholism to toll the statute of limitations is to be made on a case-by-case basis. The district court reviewed extensive trial evidence, including expert reports, con-

cerning Mr. Scott's alcoholism and mental incompetence. The court's resultant finding, that Mr. Scott was indeed mentally incompetent to the point that he was unable to file a tax return during the relevant period, was not clearly erroneous. *See Campbell v. Wood*, 18 F.3d 662, 681 (9th Cir.) (en banc), *cert. denied*, 114 S. Ct. 2125 (1994).

CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

FERNANDEZ, Circuit Judge, dissenting:

I dissent for the reasons set forth in my dissenting opinion in *Brockamp v. United States*, No. 94-56424, slip op. —— at —— (9th Cir. —— 1995).

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

No. 92-00011

NICHOLAS T. SCOTT, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed Nov. 19, 1993]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

KAY, Chief Judge.

THIS MATTER came before the Court for trial on October 5, 1993 through October 7, 1993. Having considered the testimony and other evidence presented, the Court enters its findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

BACKGROUND

Plaintiff Nicholas T. Scott ("Scott") brought this action to recover an overpayment of federal income taxes for 1984. On November 28, 1989, by filing a tax return for the 1984 taxable year, Scott made his refund claim to the Internal Revenue Service ("IRS"). The IRS refused Scott's refund claim, asserting that the statute of limitations for filing it

had expired. Scott contends that equitable tolling principles prevent his refund claim from being time-barred. He specifically argues that from the time his 1984 tax return was due to the time he actually filed that return, he suffered from severe alcoholism, which caused him to be mentally incompetent and incapable of filing a tax return. Thus, the central issues in this case are whether Scott was incompetent from the time his 1984 tax return was due to the time he actually filed that return, and, if so, whether his incompetency tolls the statute of limitations.

As an initial matter, this Court holds that any finding of fact which may be deemed, in whole or in part, more properly a conclusion of law shall be deemed as such, and any conclusion of law which may be deemed, in whole or in part, more properly a finding of fact shall be deemed as such.

FINDINGS OF FACT

A. *Scott's Refund Claim*

1. This is a federal income tax refund suit involving an overpayment of taxes by Scott for the calendar year 1984.

2. In 1984, after Scott received an inheritance, he invested that money in a partnership known as "Wine Horizons," a business which operated a retail wine store in Danville, California.

3. Prior to that time, around 1980, Scott gave a power of attorney to his father, Gene Scott. Gene Scott demanded the power of attorney when he learned that Scott had failed to file and pay federal income tax for previous years.

4. During 1984, in accordance with the terms of the power of attorney, Gene Scott made federal tax deposits on Scott's behalf. In December 1984 or January 1985, Gene Scott revoked the power of attorney by tearing it up. At the time he tore up the power of attorney, Gene Scott insisted that Scott make his last estimated tax payment for 1984, which was due in January 1985. Scott made the final payment in a timely fashion.

5. Scott paid a total of $30,096.00 to the IRS for application to his 1984 federal income taxes.

6. Scott had no tax liability for 1984.

7. Scott's 1984 tax return was due on April 15, 1985.

8. Scott filed a tax return for the 1984 taxable year on November 29, 1989. Through that tax return, Scott sought a refund of the $30,096.00, plus interest.

9. The IRS denied the claim for refund, maintaining that the statute of limitations for filing a refund claim had expired. The United States cites the applicable statute of limitations as 28 U.S.C. § 6511.

10. On January 8, 1992, shortly after the IRS denied his claim, Scott filed this action to recover the overpayment of the $30,096.00, plus interest. Scott asserts that his refund claim is not time-barred under equitable tolling principles because, from the time his 1984 tax return was due to the time he actually filed that return, he was mentally incompetent as a result of his alcoholism.

B. *Scott's Alcoholism*

11. From the early 1980's through at least early November 1989, Scott was a severe alcoholic. Scott

presented testimony from several witnesses chronicling his alcoholism. The evidence of Scott's alcoholism is overwhelming. Below are examples of this evidence:

(a) In the early 1980's, Scott began drinking large quantities of alcohol. Scott drank so heavily that he began to suffer from blackouts on a nearly daily basis, particularly in 1986 and 1987. Also because of his heavy drinking, Scott's father held a power of attorney for him from around 1980 to January 1985.

(b) Scott's heavy drinking caused him to be suspended from the California bar for failure to pay his bar dues.

(c) Scott's heavy drinking resulted in several failed relationships with women.

(d) In 1980, Scott was in a car accident because of his drinking.

(e) In 1981, Scott lost a job as an attorney because of his drinking.

(f) From 1982 through 1986, Scott received five citations from the State of California for driving under the influence of alcohol (DUI). The dates of the DUI violations include: (1) October 22, 1982; (2) July 15, 1986; (3) July 18, 1986; (4) August 14, 1987; and (5) January 2, 1988.

(g) From 1984 to July 1987, the entire time Scott operated Wine Horizons, Scott spent most of his time buying wine for the store, engaging in wine tasting sessions with his customers, and drinking wine and vodka. Because wine was not always strong enough for Scott, Scott would fill a glass full of vodka and then add a few

drops of wine to make the vodka appear to be wine.

(h) Also during the entire time Scott operated Wine Horizons, Scott paid no attention to bills or operation of the books. These matters were handled by others. Moreover, all partnership documents, sales tax returns, and other documents were prepared by others.

(i) In 1985, Scott's long-time girlfriend was killed in a car accident, causing Scott to become very depressed and to increase his alcohol intake to even greater levels.

(j) In 1985, Scott's heavy drinking caused his partner in Wine Horizons to walk out on him. Even at the time the partnership agreement was entered into in 1984, Scott and his partner added an addendum to the agreement addressing the partner's concern over Scott's potential incapacity due to alcohol abuse.

(k) In January 1987, due to his alcoholic state, Scott failed to pay the rent for his wine store, Wine Horizons. As a result, he entered into a stipulation with his landlord in which Scott agreed to pay the rent owed on a certain time frame, and, if he failed to do so, Scott's landlord was empowered to file an *ex parte* application which would allow the landlord to obtain a writ of execution on the entire inventory of Wine Horizons. This stipulation was filed in the Superior Court of the State of California, County of Contra Costa on February 9, 1987. Judgment was entered on the stipulation on June 3, 1987.

(l) In February 1987, Scott's landlord insisted that David Green, an employee of Scott, run the wine shop's operations because, due to Scott's alcohol abuse, the landlord had little confidence in Scott's competence to run it.

(m) Scott failed to pay the rent as specified in the February 1987 stipulation with his landlord, and, on July 2, 1988, Scott received a notice of default. The notice informed Scott that the writ of execution on Wine Horizons' inventory would be executed on July 10, 1987 if Scott did not pay the rent owed.

(n) Scott kept his personal collection of wines, worth about $30,000.00, at Wine Horizons. His personal collection was not part of Wine Horizons' inventory. Even though Scott knew that his personal collection would be seized with Wine Horizons' inventory if he did not remove it from the store, Scott did nothing to protect his personal collection because his alcoholic state made him apathetic and uncaring about anything but his next drink. Scott ignored the pleas of friends urging him to protect his personal collection of wine.

(o) When the writ of execution was executed on July 10, 1987, Scott simply remained in the store, drinking, as the sheriff took away the inventory.

(p) With regards to the August 14, 1987 DUI violation, Scott was sentenced to 30 days in prison and 10 days at DUI school. Any person showing up to the DUI school while intoxicated would be thrown out of the school. Scott was thrown out of the school because he showed up

with alcohol on his breath. Scott served the 30 days of prison starting sometime in mid-August 1987 through sometime in mid-September 1987.

(q) After Scott was released from prison in mid-September 1987, he attended the public sale of Wine Horizons' inventory. Scott believed the wine was being sold to his landlord's attorney through a strawman and believed this to be illegal. Nevertheless, Scott's alcoholic state prevented him from objecting to the sale.

(r) Sometime after the public sale of Wine Horizons' inventory, Scott was evicted from the building in which Wine Horizons had operated. When he was evicted, Scott did not even attempt to safeguard or rescue his business records.

(s) For Scott's fourth and fifth DUI violations, Scott was incarcerated from about November 23, 1987 to September 1, 1988. When incarcerated during this period, Scott was a member of an alcoholic rehabilitation program at prison, known as the Deuce Program. As part of this program, Scott was allowed supervised releases from prison, normally for 48 hours every two weeks. On January 2, 1988, the date of Scott's fifth DUI violation, Scott had been released from prison on the order of a California state judge so that he could help his girlfriend move into a new apartment. Despite the fact that Scott obtained an additional DUI while on release, Scott was not removed from the Deuce Program, and, was still allowed releases from prison. During Scott's 48-hour releases from prison, Scott would drink continuously.

(t) As soon as Scott was released from prison in September 1988, Scott immediately became intoxicated.

(u) Several days after his release from prison, Scott's sister urged him to pay his federal income taxes. At her continued insistence, Scott finally obtained an accountant to prepare the income tax returns. Scott obtained the accountant sometime in January 1989, but, because of his alcoholic state, did not get the necessary documents to the accountant until shortly before the 1984 tax return was filed in November 1989.

12. In addition to these examples, the expert testimony in this case, discussed below, supports a finding that Scott suffered from severe alcoholism from the early 1980's through at least early November 1989.

C. *Scott's Mental Competency*

1. *Expert Testimony*

13. Dr. Gerald McKenna, M.D., testified as an expert witness for the United States. Both parties agreed that Dr. McKenna is highly qualified to testify about the subject of the effect of alcohol abuse on a person's mental competency. Dr. McKenna's Curriculum Vitae, expert report and expert testimony support a finding that Dr. McKenna is an expert on this subject. Based on the foregoing, this Court finds that Dr. McKenna is an expert qualified to testify about the effect of alcohol abuse on a person's mental competency.

14. Dr. Patrick Norman, M.D., testified as an expert witness for Scott. Both parties agreed that Dr. Norman is highly qualified to testify about the subject of the effect of alcohol abuse on a person's mental competency. Dr. Norman's Curriculum Vitae, expert report and expert testimony support a finding that Dr. Norman is an expert on this subject. This Court finds that Dr. Norman is an expert qualified to testify about the effect of alcohol abuse on a person's mental competency.

15. In forming their expert opinions, both Dr. McKenna and Dr. Norman relied on the same evidence that each party presented to the Court during the trial on this matter, including, but not limited to, the facts as described in Part B.

16. Dr. McKenna and Dr. Norman were in agreement about Scott's mental competency, an unusual circumstance in this Court's experience. They testified that:

(a) Alcohol is a drug which can lead to mental incompetence if used in sufficient doses and over a long enough period of time. The degree of mental incompetence is directly related to the dosage of alcohol and the length of time over which high doses of alcohol have been consumed. High doses of alcohol induce blackouts.

(b) Alcoholism is a disease, not a wrongful or reprehensible act.

(c) Scott suffered from severe alcoholism from the early 1980's to at least early November 1989.

(d) Scott was mentally incompetent from, at least, January 1985 through September 1987 and September 1988 through November 1989, and, as a result, did not have the mental capacity to file his tax return during this period.

(e) As to Scott's mental condition while in jail from September 1987 through September 1988, the experts testified to the following:

(i) While both experts were not precisely certain as to whether Scott was mentally incompetent while in jail between September 1987 and September 1988, both of them agreed that there is a residual impact from alcohol abuse which delays the recovery of cognitive abilities. They both further agreed that it is not necessary to have alcohol in your system to experience the residual impact and to remain mentally incompetent.

(ii) Dr. Norman also testified about the dry drunk syndrome where incompetence from alcoholism is retained if the alcoholic is not committed to rehabilitation. Dr. McKenna did not challenge Dr. Norman's testimony regarding the dry drunk syndrome.

17. Based on this expert testimony concerning the residual impact of alcohol abuse and the dry drunk syndrome, and based on the fact that, when Scott was released from the Deuce Program every two weeks, Scott constantly drank during the release, this Court finds that Scott also suffered from severe alcoholism during his term in jail from September 1987 to September 1988, and, as a result, was mentally incompetent to file his tax return during this period.

2. *United States' Counter-Argument*

18. The United States attempted to counter the expert witnesses' testimony that Scott was mentally incompetent. Some of the facts which the United States highlighted to argue Scott was competent to file a 1984 tax return include:

(a) In 1984, Scott executed a partnership agreement to operate Wine Horizons.

(b) In 1985, Scott entered into an agreement dissolving the partnership so that he could operate Wine Horizons on his own.

(c) During the time he operated Wine Horizons, Scott filed state sales tax.

(d) Scott obtained an attorney to represent him on his 1987 and 1988 DUI charges.

(e) Scott opened and closed his retail business everyday.

(f) Scott paid his utilities and rent.

19. As detailed above, Scott explained that most of these matters were initiated and handled by persons other than himself. Additionally, the attorney who represented him on the DUI charges was not retained to do anything regarding Scott's tax affairs.

20. The facts highlighted by the United States to establish that Scott was competent to file his tax return were before Dr. McKenna and Dr. Norman when they formed their opinions about Scott's mental competency.

21. Without the expert testimony in this case, the Court might otherwise find the United States' argument somewhat persuasive. Given that the expert witnesses had the facts highlighted by the United States before them when they formed their opinions and that the experts have been qualified to deliver opinions about Scott's mental competency, this Court finds the expert testimony of Dr. McKenna and Dr. Norman to be more credible than argument and evidence of the United States, and therefore holds that the expert testimony is controlling. Scott's rebutting testimony supports a finding that the expert testimony is controlling.

3. *Findings On Scott's Competency*

22. Based on the testimony of both parties' expert witnesses and the facts as described in Part B, the Court finds that:

(a) Scott was mentally incompetent from January 1985 through early November 1989, including the period in which Scott was in and out of jail in 1987 and 1988.

(b) Scott did not have the capacity to file his 1984 tax return during the years of his incompetency, including the period in which Scott was in and out of jail.

D. *Damages*

23. Scott and the United States have stipulated that Scott made an overpayment of $30,096.00 on his 1984 taxes.

24. Scott and the United States have stipulated that the interest on the $30,096.00 from November 28, 1989 to October 5, 1993 brings the total to $41,327.00.

25. Scott and the United States have stipulated that the interest on the $30,096.00 from April 15, 1985 to October 5, 1993 brings the total to $64,873.00.

26. Scott and the United States have stipulated that the amount awarded by the Court should continue to accrue interest from October 6, 1993.

27. Scott and the United States acknowledge that the Internal Revenue Code provides for interest to the prevailing refund claimant from and after the time he files his refund claim. Nevertheless, Scott argues that the Court should use its equitable powers to award Scott interest from the date his 1984 tax return was due, as the United States has had the use of his money from that date.

CONCLUSIONS OF LAW

1. Given that this Court has found that Scott was mentally incompetent and could not file his 1984 federal income tax return during the period from January 1985 through early November 1989, the issue becomes whether his incompetency will toll the statute of limitations for tax refund cases.

2. The appropriate limitations period for tax refund cases is set forth in 26 U.S.C. §§ 6511.

3. In *Scott v. United States*, 795 F.Supp. 1028 (D.Haw.1992) (*Scott I*), this Court denied the United States' motion to dismiss Scott's complaint. This Court held that principles of equitable tolling apply to tax refund cases, and that mental incompetency constitutes a ground for equitable tolling. *Id.* at 1035. The United States relies on *Oropallo v. United States*, 994 F.2d 25 (1st Cir.1993), which held that equitable tolling principles do not apply in tax refund cases, to request that this Court reconsider its contrary holding in *Scott I*.

4. In holding that equitable tolling principles do not apply in tax refund cases, *Oropallo* relied on *Lampf, Pleva, Lipkind, Prupis & Petrigrow v. Gilberston*, 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991). In *Lampf*, the United States Supreme Court considered whether to adopt a federal limitations period in private suits under section 10(b) of the Securities Exchange Act of 1934 ("1934 Act"), and, if so, whether that period would be subject to equitable tolling. The Supreme Court selected the 1-and-3-year limitations periods contained in the 1934 Act and in the original remedial provisions of the Securities Act of 1933, as typified by section 9(e) of the 1934 Act, 15 U.S.C. § 78i(e). *Lampf*, 501

U.S. at 361, 362, 111 S.Ct. at 2781, 2782 n. 9. Section 78i(e) provides that "[n]o action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation." 15 U.S.C. § 78i(e). Citing *Irwin v. Veterans Administration*, 498 U.S. 89, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990), the Supreme Court acknowledged that time limits in law suits are normally subject to equitable tolling. Nevertheless, the Supreme Court found that section 78i(e) was not subject to equitable tolling because equitable tolling is fundamentally inconsistent with the 1-and-3-year structure. *Lampf*, 501 U.S. at ——, 111 S.Ct. at 2782. The *Lampf* Court explained the effect of section 78i(e) as follows: (1) the 1-year period makes tolling unnecessary because that period begins only after the discovery of the facts constituting the violation, and (2) the 3-year period acted as the outside limit for which Congress intended that a plaintiff could bring an action. *Id.* The *Lampf* Court then stated that "[b]ecause the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period." *Id.* Thus, the Supreme Court's principal rationale for not applying equitable tolling in *Lampf* was the cutoff provision of section 78i(e).

5. The *Oropallo* court stated "[w]e think that section 6511(a) and (b)(2)(A) are structured like the 1-and-3-period considered by the Supreme Court in *Lampf*," and therefore refused to apply equitable tolling principles to tax refund cases. *Oropallo*, 994 F.2d at 30. *Oropallo* found section 6511(a) to be analogous to the 1-year period in *Lampf*, stating: "We have assumed that a return can be filed at any

time after its due date and still be a return for purposes of filing a claim within that three-year period. Under that interpretation, the limitations period in section 6511(a) is totally illusory." *Id.* *Oropallo* then found section 6511(b)(2)(A)'s limit on the amount of money a taxpayer can recover to be analogous to section 78i(e)'s limit on the institution of a cause of action, stating: "By imposing an 'outside limit' or 'cut-off' on the amount of taxes which can be recovered, section 6511(b)(2)(A) operates like the three-year portion of the limitations period in *Lampf*, and thus is a 'period of repose inconsistent with tolling.'" *Id.* at 31.

6. This Court disagrees with *Oropallo*'s interpretation of section 6511, and therefore finds this section distinguishable from the limitations period in *Lampf*. Because the Supreme Court's principal rationale for not applying equitable tolling in *Lampf* was the cutoff provision of section 78i(e), this Court focuses on *Oropallo*'s analysis of section 6511(b)(2)(A) as a cutoff which is inconsisent with equitable tolling. This Court disagrees with *Oropallo*'s finding that section 6511(b)(2)(A)'s limit on the amount of money a taxpayer can recover is similar to section 78i(e)'s limit on bringing a case. The 3-year period in *Lampf* provides that no "*action* shall be maintained to enforce any liability created under this section, unless brought . . . within three years after such violation." 15 U.S.C. 78i(e) (emphasis added). Thus, this period is a total bar to an action brought outside the required time. Section 6511(b)(2)(A) however is not a total bar, but a limit on the amount of recovery. Section 6511(b)(2)(A) provides that "the credit or refund shall not exceed the portion of the tax paid

during the two years immediately preceding the filing of the claim." 26 U.S.C. § 6511(b)(2)(A). Unlike section 78i(e), section 6511(b)(2)(A) in no way prevents the bringing of a lawsuit, it simply limits the amount of money the taxpayer can recover. Thus, section 6511(b)(2)(A)'s period of repose is significantly different than section 78i(e)'s period of repose and is not inconsistent with equitable tolling.

7. In addition to finding section 6511 distinguishable from the limitations period in *Lampf*, this Court disagrees with *Oropallo* on another basis. *Oropallo* discussed section 6511(a), which requires a taxpayer to file a refund claim within three years of filing a return, or, if no return was filed, within two years from the date the tax was paid. In discussing section 6511(a), the *Oropallo* Court declared this section to be analogous to the 1-year period in section 78i(e), stating:

> In *Lampf*, the Supreme Court commented that the one-year period for filing suit after discovery of facts giving rise to the cause of action made tolling unnecessary. What the Court obviously meant was that once someone who has been defrauded knows the relevant facts, the 1-year period gives that person ample time in which to sue and there is no need to toll the 1-year limitations period. A similar state of knowledge respecting the right to a refund can be attributed to individual calendar year taxpayers who file income tax returns. The return contains all the information necessary to verify that there has been an overpayment of taxes and that a refund is due. Accordingly, the three-year period in section 6511(a) gives the taxpayer ample time to file a refund claim, and there is no need to toll that period.

Oropallo, 994 F.2d at 30 (citations omitted). This Court disagrees with *Oropallo*'s analysis of section 6511(a). If a taxpayer is mentally incompetent, that taxpayer will not necessarily be able to evaluate a tax return to determine whether a right to an overpayment exists. Moreover, in this case no tax return was prepared until 1989 due to Scott's incompetency. Furthermore, the tax return will not always have all the information necessary to verify that there has been an overpayment. Taxpayers must often examine documents collateral to the tax return to determine whether there has been an overpayment. Consequently, this Court finds that section 6511(a) is not analogous to *Lampf*'s 1-year limitations period in section 78i(e).

8. Because this Court disagrees with *Oropallo*'s interpretation of sections 6511 and finds the section distinguishable from the limitations period considered in *Lampf*, this Court declines to follow *Oropallo* and adheres to its earlier decision in *Scott I*, which held that section 6511 may be equitably tolled by mental incompetence under the proper circumstances. The Court discusses the rationale of the *Scott I* holding in more detail below.

9. In *Irwin v. Veterans Administration*, the *United* States Supreme Court stated:

> Once Congress has made such a waiver [of sovereign immunity to allow suits by citizens against the government], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that

> it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver.

498 U.S. at 95, 111 S.Ct. at 457. The Supreme Court then held "that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* The Ninth Circuit has noted the rebuttable presumption established in *Irwin* in *Seattle Audubon Society v. Robertson*, 931 F.2d 590, 595 (9th Cir.1991): "The [*Irwin*] Court held that whenever Congress waives the government's sovereign immunity and permits suits against the government, there is a rebuttable presumption that the doctrine of equitable tolling applies." In the case at bar, the United States has presented insufficient evidence to rebut the presumption that equitable tolling applies against it in tax refund cases.

10. Further, while *Irwin* did not directly hold that mental incompetency constitutes a ground for equitable tolling, *Irwin* supports such a holding. The *Irwin* Court noted that "[f]ederal courts typically have extended equitable relief only sparingly," and then offered two examples of situations where equitable tolling applies: where the claimant has actively pursued his judicial remedies but has filed a defective pleading, and where claimant has been induced or tricked by his adversary into allowing the filing deadline to pass. *Irwin*, 498 U.S. at 94-96, 111 S.Ct. at 457-58. The Supreme Court, however, did not intend these examples to be an exhaustive listing of the situations where equitable tolling applies. The Supreme Court used very broad language when discussing the extent to which equitable tolling applies to the United States, holding that the *same rebuttable presumption* of equitable tolling which applies to suits against private parties applies to suits against the United States. Thus, under *Irwin*, mental incompetency tolls suits against the government to the same extent that it tolls suits against private parties. Furthermore, the *Irwin* Court's use of the language, "federal courts . . . have extended" supports a finding that *Irwin* did not intend its examples to be an exhaustive listing. "Federal courts" includes the lower federal courts as well as the Supreme Court, and therefore lower federal court decisions, as well as Supreme Court decisions, should be examined to determine under what circumstances equitable tolling applies. As discussed below, lower federal courts have ruled that mental incompetency constitutes a ground for equitable tolling, and therefore, under *Irwin*, mental incompetency may toll a federal statute of limitations.

11. The Ninth Circuit has not addressed whether a federal statute of limitations may be equitably tolled by mental incompetence. Indeed, in *Atkins v. Union Pacific Railroad Co.*, 685 F.2d 1146 (9th Cir. 1982), the Ninth Circuit explicitly left open the question of whether a plaintiff's mental incompetency could toll the statute of limitations on the Federal Employers' Liability Act. After finding that the plaintiff had not established facts sufficient to support a finding that he was mentally incompetent, the Court stated:

> Because we find no issue of fact, we need not decide whether the plaintiff's incompetency will ever toll the FELA statute of limitations. *But see, Brooks v. Southern Pacific Co.*, 105 Ariz. 442, 445, 466 P.2d 736, 739 (1970) (holding

that FELA statute of limitations is tolled by incompetence).

Id. at 1148 (citation in original).

12. The cases from other jurisdictions are divided on the issue of whether mental incompetency will toll the statute of limitations. One line of cases hold that mental incompetency may not toll federal statute of limitations. *E.g.*, *Harris v. Ford Motor Co.*, 635 F.Supp. 1472, 1473-74 (E.D.Mo.1986) (and cases cited therein) (mental incompetency does not toll six month statute of limitations for filing a hybrid § 301 LMRA fair representation claim). Most of the decisions relied upon in *Harris*, however, involved claims against the federal government and therefore are called into question by *Irwin*.

13. Another line of cases finds that mental incompetency will toll federal statutes of limitations. *E.g.*, *Nunnally v. MacCausland*, 996 F.2d 1, 4-5 (1st Cir. 1993) (mental illness may toll 30-day filing period set in Civil Service Reform Act, 5 U.S.C. § 7703); *Lopez v. Citibank, N.A.*, 808 F.2d 905, 906-07 (1st Cir.1987) (mental incompetency may toll Title VII statute of limitations); *Wiltgen v. United States*, 813 F.Supp. 1387, 1395 (N.D.Iowa 1992) (mental incompetence may toll statute of limitations in tax refund actions); *Johnsen v. United States*, 758 F.Supp. 834, 835-36 (E.D.N.Y.1991) (same); *Llewellyn v. Celanese Corp.*, 693 F.Supp. 369, 379 (W.D.N.C.1988) (mental incompetency may toll Title VII statute of limitations); *Moody v. Bayliner Corp.*, 664 F. Supp. 232, 235 (E.D.N.C.1987) (same).

14. In *Lopez*, decided before the *Irwin* decision, the First Circuit held that while there in no absolute rule of equitable tolling on the grounds of mental

incompetency in Title VII cases, federal courts may toll the applicable statute of limitations on a case-by-case basis. The First Circuit initially acknowledged the line of cases finding against such tolling. *Lopez*, 808 F.2d at 906. It distinguished these cases on the basis that most involved suits against the United States and concerned "considerations of sovereign immunity."[1] *Id.* at 906-07. It then found that "an even longer line of common law authority finds, in insanity, a ground for tolling a limitations period." *Id.* at 907 (citing *Developments in the Law-Statutes of Limitations*, 63 Harv.L.Rev. 1177, 1229 (195)). Consequently, the *Lopez* Court found that mental incompetency could equitably toll the statute of limitations. The First Circuit has recently affirmed its position in *Lopez* in a post-*Irwin* decision, *Nunnally v. MacCausland*, 996 F.2d at 4-5.

15. In *Char v. Matson Terminals, Inc.*, 817 F.Supp. 850, 854-55 (D.Haw.1992), this Court adopted the reasoning of the Lopez line of cases. In accord with *Char*, this Court once again adopts the reasoning of the *Lopez* line of cases, especially in light of the fact that the cases cited in *Lopez* for the position that mental incompetency will not toll federal statutes of limitations have been called into question by *Irwin*. Hence, this Court holds that, pursuant to *Irwin v. Veterans Administration*, mental incompetency may toll the statute of limitations in tax refund cases when the appropriate circumstances are present. This holding is supported by fundamental principles of equity. Fundamental principles of equity mandate that when a person suffers from a disease rendering

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[1] These cases have been called into question by *Irwin*.

him mentally incompetent to assert his rights during the period he was incapacitated, time limitations should not operate to preclude him from seeking redress for his injuries.

16. In *Scott I*, this Court declined to determine whether alcoholism created the sort of mental incompetency necessary for equitable tolling. Based on the expert testimony in this case, this Court now finds that the disease of alcoholism can create the sort of mental incompetency necessary for equitable tolling.[2] The issue of whether a particular taxpayer

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[2] The Court notes that its holding that alcoholism may create the type of mental incompetency to toll the statute of limitations is supported by Hawaii state law. Haw.Rev.Stat. § 657-13 provides that a state statute of limitations is tolled when a person is insane at the time the cause of action has accrued. In *Christian v. Waialua Agric. Co.*, 31 Haw. 817, *appeal dismissed*, 52 F.2d 847 (9th Cir.1931), *questioned on other grounds, Sandstrom v. Larsen*, 59 Haw. 491, 495, 583 P.2d 971, 975 (1978) (questioning *Christian*'s finding that the Hawaii Supreme Court could independently review evidence and make its own findings), the Hawaii Supreme Court stated:

> In 32 C.J. 594 (§ 4), the author of the text says: " 'Insanity' is a broad, comprehensive, and generic term, of ambiguous import, for all unsound and deranged conditions of the mind. . . . And it ordinarily implies every degree of unsoundness of the mind, whether it is casual, temporary, or permanent, [and] whether of a mild or violent form; and it includes not only that derangement of the mind produced by disease of the brain, such as is recognized by law as a defense to crime, which is the sole product of it, *but it may also embrace conditions of subverted reason, such as may be produced by intoxication.* The word has been frequently used to designate all

suffers from severe enough alcoholism to cause mental incompetency should be analyzed on a case-by-case basis. *See Lopez*, 808 F.2d at 907 (equitable tolling for mental incompetence is analyzed on a case-by-case basis). The experts in this case have testified that Scott's alcoholism was sufficiently severe to cause him to be mentally incompetent. Based on this expert testimony and other evidence adduced, this Court has found that Scott's alcoholism caused him to be mentally incompetent and incapable of filing a tax return from at least January 1985 through early November 1989.

17. The United States argues that this Court should not apply equitable tolling in cases where alcoholism has caused mental incompetency on policy grounds that alcoholism results in staggering costs on society and the Court should only apply equitable principles when it is in society's best interest, as equity is " 'to live honestly, to harm nobody, to render every man his due.' " United States' Trial Brief, at 16 (quoting Justinian's Inst. lib. 1, tit. 1, § 3). The experts in this case have testified that alcoholism is a disease and not a wrongful or reprehensible act,

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> mental impairments and deficiencies formerly embraced in terms 'idiocy,' 'lunacy,' and 'unsoundness of mind.' "

Christian, 31 Haw. at 902 (emphasis added). Under the definition in *Christian*, alcoholism would constitute insanity or mental incompetence which would allow for equitable tolling.

The Court also notes that the United States Supreme Court case of *Kendall v. Ewert*, 259 U.S. 139, 42 S.Ct. 444, 66 L.Ed. 862 (1922), supports its holding that alcoholism may create the type of mental incompetency to toll the statute of limitations. In *Kendall*, the Supreme Court recognized that habitual drunkards are not competent to transact business, even if they have their sober moments. *Id.* at 146, 42 S.Ct. at 447.

and therefore equitable principles may be applied to cases where alcoholism causes mental incompetency.

18. In alternative to the *Irwin* principles discussed above, this Court holds that the impossibility doctrine discussed in *Seattle Audubon* and *Forti v. Suarez-Mason* apply to toll the statute of limitations in the case at bar. *Seattle Audubon*, 931 F.2d 590; *Forti*, 672 F.Supp. 1531 (N.D.Cal.1987). As stated in *Seattle Audubon*, when "extraordinary circumstances beyond plaintiffs' control make it impossible to file the claims on time," equitable tolling applies. 931 F.2d at 595; *Forti v. Suarez-Mason*, 672 F.Supp. at 1550 (N.D.Cal.1987) ("Where extraordinary events which are beyond plaintiff's control prevent a plaintiff from bringing his claim, the limitations period is tolled until the barrier caused by these events is removed."). Both experts have testified that Scott's alcoholism, a disease, caused Scott to be mentally incapable of filing his tax return. Thus, this Court holds that Scott's alcoholism constitutes extraordinary circumstances beyond Scott's control [3] which made it impossible for him to file his tax return, and therefore, under *Seattle Audubon* and *Forti*, the limitations period in section 6511(a) was tolled during Scott's mental incompetency. The Court notes that the United States has not shown that it has been unjustly prejudiced by the tolling of the statute of limitations. *See Seattle Audubon*, 931 F.2d at 597.

19. Given the above, Scott's refund action is not time-barred and he is entitled to a refund of his

[3] In ruling that Scott's alcoholism constitutes extraordinary circumstances beyond his control, this Court relies heavily upon the expert testimony opining that alcoholism is a disease.

overpayment of $30,096.00 for the 1984 taxable year. Scott is also entitled to interest on the overpayment. Under 26 U.S.C. § 6611, Scott is entitled to interest from the date he filed his return. The Court declines Scott's invitation to use its equitable powers to allow Scott interest from the date of the overpayment. Hence, pursuant to the parties' stipulation, interest on the $30,096.00 from November 28, 1989 to October 5, 1993 brings the total to $41,327.00. The Court also holds that the interest owed to Scott continues to accrue from October 6, 1993.

20. There being no just reason for delay, the Court hereby directs entry of final judgment in favor of Scott as specified above.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Civ. No. 92-00011 ACK

NICHOLAS T. SCOTT, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[Filed June 4, 1992]

ORDER DENYING DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

KAY, Chief Judge.

I. INTRODUCTION

This case presents an issue of first impression in the Ninth Circuit. The major issue presented is whether the time limit restrictions for filing a tax refund claim are subject to the doctrine of equitable tolling. Based upon the following analysis of the relevant authorities, the Court holds that tax refund claims are subject to equitable tolling and that a plaintiff's mental incompetency operates to toll the limitations period for the time that the plaintiff was mentally incompetent.

II. BACKGROUND

In 1984, Plaintiff Nicholas Scott's ("Plaintiff") father timely filed a tax return on Plaintiff's behalf for that year. Plaintiff claims that his father overpaid the amount of taxes due in 1984, which were paid in piecemeal installments in 1984 and 1985. Plaintiff seeks to have a portion of the alleged 1984 overpayment applied to his tax liabilities for the years 1985, 1986, and 1988. Plaintiff admits that he filed his returns for the 1984-1988 years on November 28, 1989. On January 8, 1992, after the IRS disallowed his refund claim for the $30,096.00 overpaid in the 1984 tax year, Plaintiff filed a complaint seeking to apply the amount of his overpaid taxes to his liabilities for the 1984, 1986, and 1988 tax years.[1]

Both of the parties agree that the statute of limitation for filing such a return has expired. *See*, Complaint at 2 ("Plaintiff contends that the time limitations contained in 26 U.S.C. Section 6511(a) are subject to the doctrine of Equitable Tolling"); *see also*, Plaintiff's Response at 2 (arguing that the statute of limitations should be tolled). 26 U.S.C. § 6511(a) provides that a claim for credit or refund must be filed within three years of the time the return was filed or two years from the date the tax was paid.

In this case, Plaintiff made his last payment in 1985. Plaintiff filed his refund return on November 28, 1989, four years after the tax was paid. Under the statute, Plaintiff is precluded from pursuing his claim because he filed his refund more than two years

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[1] Whether Plaintiff in fact overpaid his taxes for 1984, and by how much, is not before the Court on the instant motion.

after the 1984 taxes were paid and more than three years after the date of the 1984 return.

Defendant the United States America ("United States" or "the government") moves to dismiss on the grounds that this Court lacks subject matter jurisdiction to hear a refund claim filed after the statutory period under § 6511(a) has elapsed or for failure to state a claim upon which relief can be granted or in the alternative, for summary judgment. Plaintiff opposes, claiming that the doctrine of equitable tolling applies to vest this Court with jurisdiction. Plaintiff claims that as a result of severe and continuous alcoholism, he was mentally incompetent for the period of time 1984-1990 warranting application of the equitable tolling doctrine. Because the only issues presented by the instant motions are ones of law, and not of fact, the Court construes the government's motions as a single motion to dismiss.

The narrow issue presented by this case, then, is whether the time period for filing a claim for refund under § 6511(a) may be extended under the doctrine of equitable tolling. Since the doctrine does apply to such claims, the Court must also determine if mental incompetency may toll the statute of limitations. Because the parties have not raised or briefed the issue, the Court withholds ruling on the question of whether Defendant was in fact mentally incompetent for the relevant time period. Likewise, the Court also expresses no opinion as to whether, as a matter of law, alcoholism may give rise to mental incompetency.

III. DISCUSSION

A. STANDARD FOR MOTION TO DISMISS

Under Fed.R.Civ.P. 12, this Court must accept as true the plaintiff's allegations contained in the complaint and view them in a light most favorable to the plaintiff. *See, Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 334 (9th Cir.1990); *Shah v. County of Los Angeles*, 797 F.2d 743, 745 (9th Cir. 1986). Thus, the complaint must stand unless it appears beyond doubt that the plaintiff has alleged no facts that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957); *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.1990). A complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal theory. *Balistreri*, 901 F.2d at 699; *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir.1984).

In essence, as the Ninth Circuit has stated, "[t]he issue is not whether a plaintiff's success on the merits is likely but rather whether the claimant is entitled to proceed beyond the threshold in attempting to establish his claims." *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir.), *cert. denied*, 441 U.S. 965, 99 S.Ct. 2416, 60 L.Ed.2d 1072 (1979). The Court must determine whether or not it appears to a certainty under existing law that no relief can be granted under any set of facts that might be proved in support of plaintiffs' claims. *Id.*

In his complaint and moving papers Plaintiff claims to have been mentally incompetent as a result of his severe alcoholism to such an extent that he could not manage his business or day-to-day affairs. Accordingly, the Court accepts as true, for the purposes of this motion only, Plaintiff's allegation that he was completely and continuously mentally incompetent for the relevant time period.

B. THE MERITS

1. *Tax Refund Claims are Subject to Equitable Tolling.*

The government contends that statutes of limitations covering suits against the United States are prerequisites to federal court jurisdiction. *E.g.*, *United States v. Mottaz*, 476 U.S. 834, 106 S.Ct. 2224, 2229, 90 L.Ed.2d 841 (1986) (statute of limitations defines extent of court's jurisdiction). While this contention is true as a general proposition, the Supreme Court has recognized exceptions to strict application of time-bar rules. In support of its motion to dismiss, the government cites numerous cases all of which pre-date the Supreme Court's recent decision in *Irwin v. Veterans Admin.*, 498 U.S. 89, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990). The *Irwin* Court recognized that the statute of limitations may be equitably tolled even where the statute of limitations is a prerequisite to federal court jurisdiction, rendering the cases cited by the government inapplicable.

In *Irwin*, the plaintiff filed an untimely civil action under Title VII based on a claim that the Veterans Administration unlawfully discharged plaintiff because of his race and physical disability. The plaintiff, Irwin, failed to file suit within 30 days of receiving the EEOC's notice rejecting his claim. Irwin claimed that he failed to file because the EEOC letter was sent to his attorney's office while his attorney was on vacation. As a result of his late receipt of the letter, Irwin filed suit 44 days after the letter arrived at his attorney's office.

After finding that Irwin's complaint was untimely, the Court considered whether his error may be excused under equitable tolling principles. The Court viewed this case as an opportunity to adopt "a general rule to govern the applicability of equitable tolling in suits against the Government." *Irwin*, 111 S.Ct. at 457. The Court stated:

> Once Congress has made such a waiver [of sovereign immunity to allow suits by citizens against the government], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver.

Id. The Court then held "that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.*

The Court went on to state that federal courts have used equitable tolling only "sparingly." *Id.* The Court then offered two non-exhaustive examples of where the Court has previously recognized equitable tolling: where the claimant has actively pursued his judicial remedies but has filed a defective pleading and where claimant has been induced or tricked by his adversary into allowing the filing deadline to pass. *Id.* at 457-8.

The Court held that Irwin's failure to timely file was a result of excusable neglect. *Id.* at 458 ("[T]he principles of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect.").

While *Irwin* involved an untimely Title VII claim, the reasoning in that decision applies with equal force to untimely tax claims. As in tax cases, the statute of limitations applicable to Title VII cases has been interpreted as a prerequisite to federal court jurisdiction. *See, Irwin* at 455. In *Irwin*, the Court held that such late-filed claims are not jurisdictionally barred when the doctrine of equitable tolling applies.

A recent District Court opinion from the Second Circuit has applied *Irwin* to facts similar to the instant case. In *Johnsen v. United States*, 758 F.Supp. 834 (E.D.N.Y.1991), the Court held that under *Irwin*, the plaintiff's mental incompetency equitably tolled the statute of limitation on a tax refund claim.

In 1983, the Multzmans overpaid their taxes by approximately $25,000. They did not file a return as the result of mental incompetency.[2] After Plaintiff Johnsen was appointed as Mrs. Multzman's representative, Johnsen filed a return on Mrs. Multzman's behalf and subsequently in 1989 filed an action for refund of the overpaid taxes. Although both the return and the complaint were untimely, the Court held that the statute of limitations was tolled for the period that Mrs. Multzman was mentally incompetent. *Johnsen*, 758 F.Supp. at 836 (so holding "under the authority of *Irwin*").

[2] In the *Johnsen* case, the government stipulated, for purposes of the motion, that Mrs. Multzman, her husband, and her son were all mentally incompetent in 1983.

The Court noted that the legislative history of Section 6511 "is absolutely devoid of any indication that Congress intended to preclude such equitable tolling in tax refund actions." *Id.* at 835-6.

In this case, Plaintiff has alleged, and has offered supporting affidavits, that he was totally and continually mentally incompetent to manage his affairs during the time period 1984-1990. *See*, Complaint at 4-5; Plaintiff's Response Memorandum at 2; Affidavits attached as exhibits 9 and 11 to Plaintiffs Response Memorandum. While it may be unlikely that Plaintiff will ultimately prevail in convincing the Court that he was, in fact, mentally incompetent, on a motion to dismiss the Court must draw all reasonable inferences in his favor. In light of this standard, this case is quite similar to *Johnsen*. That is, Plaintiff alleges that he was mentally incompetent to file his returns and institute a lawsuit during the statutory period. Assuming for the purposes of this motion that Plaintiff was incompetent, the principles of equitable tolling should apply as under the *Johnsen* case.[3]

In support of its motion to dismiss, the United States relies heavily upon *United States v. Dalm*, 494 U.S. 596, 110 S.Ct. 1361, 108 L.Ed.2d 548 *reh. denied*, 495 U.S. 941, 110 S.Ct. 2195, 109 L.Ed.2d 523 (1990). The government contends that *Dalm* stands for the proposition that equitable tolling does not apply to tax refund cases. However, *Dalm* did not discuss equitable tolling, but instead dealt

[3] *See also*, the discussion on mental incompetency, *infra*.

with the entirely distinct tax doctrine of equitable recoupment.

In *Dalm*, Frances Dalm was appointed as the administratrix to the estate of her former employer, to whom she had been a loyal secretary for many years. The former employer's brother paid her over $300,000 in addition to the money she received from the estate. She declared the $300,000 as a gift for taxation purposes. The IRS later determined that the $300,000 should have been reported as income and assessed a deficiency against Dalm.

Dalm brought suit against the IRS in Tax Court for redetermination of the alleged deficiencies. After two days of trial, Dalm and the IRS settled the case for a specified sum labeled as "income tax." At trial Dalm did not claim to be entitled to a recoupment for the "gift tax" she had previously paid.

Immediately after entering the settlement, Dalm filed for a refund of the gift tax previously paid. After the IRS denied the claim, Dalm filed suit. By the time she filed her complaint, Dalm's suit had been barred by the statute of limitations, § 6511, for six years.

The Court framed the issue in *Dalm* as follows:

> The question presented is whether, the statute of limitations long since having run, the doctrine of equitable recoupment supports a separate suit for refund of the earlier paid gift tax after the taxpayer settled the Tax Court deficiency proceeding and agreed to pay income tax on the transaction.

Dalm 110 S.Ct. at 1363. As the Court explained, the doctrine of equitable recoupment operates to allow a

taxpayer, in certain specified circumstances, to recoup or offset any previously overpaid taxes against his current taxes notwithstanding the fact that the statute of limitation for filing a refund on the previous taxes has run. *See id.* at 1366. Significantly, equitable recoupment may only be raised when there is an ongoing lawsuit for an income tax deficiency. *See id.* The Court stated that equitable recoupment "is in the nature of a *defense* arising out of some feature of the transaction upon which the plaintiff's action is grounded." *Id.* at 1366-7 (citation omitted; emphasis supplied).

In refusing to apply equitable recoupment to Dalm's claim the Court summarized the doctrine as follows: "a party litigating a tax claim in a timely proceeding may, in that proceeding, seek recoupment of a related, and inconsistent, but now time-barred tax claim relating to the same transaction." *Id.* at 1368. The Court emphasized that Dalm was not raising equitable recoupment as a *defense*, but rather as an independent basis for jurisdiction. *Id.* ("[W]e have not allowed equitable recoupment to be the sole basis for jurisdiction.")

On the jurisdictional point, the Court stated that although time-bar restrictions should not be construed unduly restrictively, they should not be interpreted to extend the waiver of sovereign immunity beyond that which Congress intended. *Id.* The Court then stated that its previous holdings—that equitable recoupment could be raised as a defense—did not suspend the jurisdictional rules. To extend those holdings to allow equitable recoupment as an independent basis of jurisdiction, however, would impermissibly contravene Congress's intent.

The Court cited 26 U.S.C. §§ 1311-1314 as further evidence of Congress's intent not to extend equitable recoupment. Those sections permit a taxpayer who has been required to pay inconsistent taxes to seek a refund otherwise barred by the statute of limitations, i.e. § 6511(a). Sections 1311-1314 are exceptions to § 6511 in instances where a taxpayer has been *required* to pay *inconsistent* taxes. In this extremely limited area of the tax code, Congress has spoken and the Court reasoned that it should not override Congress's judgment to create an additional exception. *Id.* at 1369.

The *Dalm* case is distinguishable from *Irwin*. In *Dalm* the issue was very narrow: Whether the doctrine of equitable recoupment could serve as an independent basis for federal jurisdiction. Essential to the Court's analysis was the fact that Dalm could have, but did not, raise that claim in the prevous Tax Court litigation. *Dalm* at 1370. *Irwin* contemplates an entirely different situation. The *Irwin* Court sought to soften the sometimes harsh effect of statutes of limitations when they operate to deny a litigant the opportunity to seek redress for an injury. In *Dalm*, the plaintiff had such an opportunity but failed to capitalize on it. Additionally, the *Dalm* Court emphasized that Congress already provides methods to mitigate the harsh rule of the statute of limitations in *certain limited* tax matters, i.e. those matters where the taxpayer is required to pay tax on inconsistently taxable items (e.g. "gift" and "income"). Congress has not expressed such an intent in the other areas of the tax code. *Johnsen v. United States*, 758 F.Supp. at 835-836 (The legislative history of the statute of limitations "is absolutely devoid

of any indication that Congress intended to preclude such equitable tolling in tax refund actions." (citing to legislative history)). Thus, the holding in *Dalm* was limited to the area of inconsistently taxable items under §§ 1311-1314.

The dissenting opinion in *Dalm* further suggests that the rule from the majority opinion has limited application. Justice Stevens, writing for two other Justices, stated that "[t]his is not a decision that will be much celebrated or often cited." *Id.* at 1370 (Stevens, J., dissenting). He also noted that "[f]ew cases are affected, and not a single brief *amicus curiae* was filed." *Id.* He concluded that the case "has no apparent importance." *Id.* It can be inferred from the dissent's comments that the Court, and indeed other members of the legal community, did not contemplate or intend that this case have the far-reaching effect that the government claims it does.

Moreover, *Irwin* was decided by the same Court only nine months after *Dalm*. Had the Court viewed *Dalm* as a limit to *Irwin*, it likely would have so stated. Indeed, if *Dalm* stood for the proposition that equitable tolling does not apply to tax refund cases, as the government asserts, the *Irwin* Court would have cited *Dalm* as an example of how the federal courts apply equitable tolling "only sparingly." However, the *Irwin* Court does not even mention *Dalm*. Because *Dalm* and *Irwin* dealt with different principles, *Dalm* with the narrow issue of equitable recoupment and *Irwin* with the broad principle of equitable tolling, this Court will not apply *Dalm* to the instant case.

The government also relies upon *Vintilla v. United States*, 931 F.2d 1444 (11th Cir.1991), a case decided after *Irwin* and *Dalm*. In *Vintilla*, the Eleventh Cir-

cuit Court of Appeals applied *Dalm* and only cursorily mentioned *Irwin* in a footnote. The Court stated that "general principles of equity may not override statutory requirements for timely filing of tax refund claims." *Vintilla* at 1446. The Court cited the language in *Dalm* that time-bar provisions are not to be construed unduly restrictively but courts must not extend the waiver beyond that which Congress intended. The Court then held that allowing equitable tolling would do little more than override the judgment of Congress in making exceptions to the tax code statute of limitations.

However, in *Dalm*, the Court stated that, "Congress has legislated a set of exceptions to limitations prescribed by §§ 7422 and 6511(a) . . . . known as . . . §§ 1311-1314." *Dalm* at 1369 (emphasis supplied). These exceptions apply in very limited circumstances and were not intended as the exclusive equitable exceptions for all types of claims. Indeed, the *Dalm* Court stated that §§ 1311-1314 are limited exceptions to the general statute of limitations, those exceptions being relevant only to inconsistently taxed items. *Dalm* at 1369 (§§ 1311-1314, "in specified circumstances, permit a taxpayer who has been required to pay inconsistent taxes to seek a refund of a tax the recovery of which is otherwise barred by §§ 7422(a) and 6511(a)."). Thus, §§ 1311-1314 only apply to the narrow circumstances of permitting equitable recoupment for inconsistently taxed items and do not contemplate other situations where equity may require tolling of the general statute of limitations period as described in §§ 7422 and 6511(a).

In a single footnote, the *Vintilla* Court saw fit to dispose of *Irwin* with little, if any, analysis. In footnote 1, the Court quoted the language of *Irwin* that

equitable tolling is applicable to the government to the same extent as it applies to private parties. The Court went on to state that "[t]he *Irwin* Court made no attempt to reconcile this language with the seemingly contradictory language of *Dalm*." *Vintilla* at 1447, n. 1. The *Vintilla* Court likewise made no such attempt. The Court gave no basis whatsoever for following *Dalm* instead of *Irwin*. The Court did however, list the two equitable tolling categories discussed in *Irwin*[4] and went on to conclude, without further discussion, that the plaintiffs did not fit into these categories. *Id.*

In reaching its conclusion, the *Vintilla* Court characterized the equitable tolling categories in *Irwin* as the only two instances in which equitable tolling is warranted. The language of the *Irwin* decision does not support that characterization. The *Irwin* Court first noted that "[f]ederal courts typically have extended equitable relief only sparingly." *Irwin* at 457. The Court then listed instances where it, the Supreme Court, has so extended equitable relief—the two categories discussed in *Vintilla*. *Irwin* at 457-458. The *Irwin* Court's language indicates that the Court did not purport to list the only categories of equitable tolling available to litigants, but rather simply stated the two instances where the Court has had occasion to consider equitable tolling principles. *See, id.* 111 S.Ct. at 458, n. 2 and n. 3 (citing only Supreme Court opinions).

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[4] As discussed above, the two categories discussed by the *Irwin* Court are (1) where the claimant actively pursues his judicial remedies by filing a defective pleading during the statutory period and (2) where the claimant has been tricked or induced by his adversary's misconduct into allowing the filing deadline to pass. *Irwin* at 458.

As discussed below, the Circuit and District Courts have extended equitable tolling to categories other than those in Supreme Court opinions, one such category being a plaintiff's mental incompetency. Presumably, the Supreme Court did not overrule all cases applying equitable tolling principles inconsistent with the two categories the Court has previously considered. It makes better sense to read the Court's opinion in light of the lower federal court opinions on the subject. This reading would account for the Court's use of the language, "federal courts . . . have extended." Surely "federal courts" include the lower federal courts as well as the Supreme Court. If the Court had intended to limit equitable tolling to the two narrow categories discussed in the *Irwin* opinon, the Court would have so stated. Instead, however, the Court used broad language in discussing the extent to which equitable tolling principles are applicable in suit against the United States. The Court held that "the *same* rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Irwin*, 111 S.Ct. at 457. Since courts have applied equitable tolling principles other than the two categories discussed in *Irwin*, the *Irwin* categories must be read as non-exhaustive examples. Accordingly, the Court finds that the categories listed by the Court in *Irwin* are not exclusive.

The Court finds *Irwin* controlling and holds that the principles of equitable tolling apply to tax refund claims to the same extent that those principles apply to private parties. In that regard, this Court's holding is consistent with the *Johnsen* case. The instant case is very similar to the *Johnsen* case given the fact that on a motion to dismiss, the Court must accept

as true Plaintiff's assertion that he was mentally incompetent from 1984-1990. The *Dalm* case is distinguishable on its facts and on the law applied therein. Because the government moves to dismiss on jurisdictional grounds, claiming that the statute of limitations may not be tolled as a matter of law, the Court denies the government's motion.

2. *Mental Incompetency Tolls the Statute of Limitations.*

Neither of the parties have adequately briefed the issue of whether, as a matter of law, mental incompetency may equitably toll the statute of limitations; however, there is some federal case law on point. The Ninth Circuit has recognized that a statute of limitations may be equitably tolled when "extraordinary circumstances beyond plaintiff['s] control made it impossible to file the claim[] on time." *Seattle Audubon Society v. Robertson*, 931 F.2d 590 (9th Cir.1991). The Ninth Circuit has not yet considered whether mental incompetency so tolls a statute of limitations. Other courts, however, have held that mental incompetency will equitably toll the statute of limitations. The *Johnsen* case, *supra*, held that mental incompetency tolls the statute of limitations for filing a tax refund claim. Additionally, a District Court in the Sixth Circuit has held that

> as a matter of federal law, in [a] . . . suit between private parties, the period for filing a charge with the [EEOC] may be tolled, in the discretion of the Court, for that period of time during which the claimant was adjudicated mentally incompetent.

Basset v. Sterling Drug, Inc., 578 F.Supp. 1244, 1248 (S.D.Ohio); *compare, Lopez v. Citibank, N.A.*, 808 F.2d 905 (1st Cir.1987) (mental incompetency for tolling purposes considered under a case-specific analysis rather than an absolute rule). Fundamental principles of equity mandate that when a person suffers from a disease rendering him mentally incompetent to assert his rights during the period he was incapacitated, time limitations should not operate to preclude him from seeking redress for his injuries.

In light of the *Johnsen* and *Basset* cases, the Court finds that mental incompetency may, in appropriate cases, toll the statute of limitations for filing a tax refund action.

IV. CONCLUSION

The Court finds, under the authority of *Irwin*, that equitable tolling principles apply to tax refund claims. The Court also finds persuasive the *Johnsen* case, which held that mental incompetency will equitable toll the tax code statute of limitations for refund claims. The *Dalm* decision dealt with the narrow issue of equitable recoupment and therefore does not apply here. Accordingly, the United States' motion to dismiss is denied.

MOTION DENIED.

Supreme Court, U.S.
FILED
MAY 10 1996
CLERK

No. 95-1225

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER,

V.

MARIAN BROCKAMP, ADMINISTRATOR OF THE ESTATE OF STANLEY B. McGILL, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF

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Question Presented For Review

Whether the doctrine of equitable tolling, presumed to apply to claims against the government as expressed in Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990), is applicable to toll the limitations period for tax refund claims under 26 U.S.C. §§ 6511 (a) and (b).

Table Of Contents

	Page
Opinions below	2
Jurisdiction	2
Statutory provisions involved	2
Statement	2
Discussion	7
Conclusion	8

Table Of Authorities

Cases:

Bull v. United States, 295 U.S. 247 (1935) 5

First Alabama Bank, N.A. v. United States,
981 F.2d 1226 (11th Cir. 1993) 7

Irwin v. Department of Veterans Affairs,
498 U.S. 89 (1990) 4, 6, 8

Oropallo v. United States, 994 F.2d 25 994 F.2d 25
(1st Cir. 1993), cert. denied, 114 S. Ct. 705 (1994) ... 5, 7

United States v. Dalm, 494 U.S. 596 (1990) 5, 6

Webb v. United States, 66 F.3d 691, (4th Cir. 1995) .. 7

Vintilla v. United States, 931 F.2d 1444
(11th Cir. 1991) 7

Statutes:

26 U.S. C. §6511 2

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet App. 1a - 16a) is reported at 67 F.3d 260. The opinion of the district court (Pet. App. 17a - 30a) is reported at 859 F. Supp. 1283.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1995. The petition for a writ of certiorari was filed on January 31, 1996. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 6511 and 7422 of the Internal Revenue Code, 26 U.S.C. §1 et. seq., are set forth at Pet. App. 2-4.

STATEMENT

1. Respondent Marian Brockamp is the administrator and sole beneficiary of the estate of her father, Stanley McGill. On or about April 16, 1984, Mr. McGill, then aged 93, issued a personal check in favor of "Internal Revenue Service" in the sum of $7,000. The check did not indicate whether the $7,000 remittance was for income, gift or any other type of tax, or the

period for which the remittance applied. Mr. McGill did not file an income tax return for 1983 or for any of the five remaining years of his life, and the $7,000 remittance was the last he ever made.[1] When the check was received by the Internal Revenue Service, it was placed in a "suspense" account, and on July 5, 1991 was transferred into an "Excess Collection Account."

2. Beginning in the late 1970's, Mr. McGill's health began to deteriorate, and he developed the classic symptoms of senile dementia. He began to look dazed and disoriented, and would walk about the house naked, unaware of his nakedness. On one occasion, he went to the corner mailbox in a state of undress, and when confronted with his act, was unaware of what had happened. He could no longer remember recent conversations. He would begin to dial a telephone, and suddenly forget whom he was calling. He also developed troubles with his checkbook; bills for $100 and $400 would be paid with checks for $1,000 and $4,000. As a result of his dangerous forgetfulness, Respondent convinced Mr. McGill to give her

[1] IRS computer records indicate that an extension request was submitted with the $7,000 check, although this document has never been found.

son some checkwriting authority, and he agreed. It is likely, however, that he forgot this conversation as well.[2]

3. In response to Requests for Admissions, Petitioner admitted that Mr. McGill, who had long since retired, did not have an income in 1983 that could have resulted in a $7,000 tax liability.

4. Following Mr. McGill's death in 1988, Respondent discovered the $7,000 check in Mr. McGill's belongings. After she was appointed administrator of his estate, she wrote the IRS, requesting that the $7,000 be returned. The Service refused, noting that the taxes had been paid "more than three years prior to her claim."

5. Respondent thereafter commenced this tax refund action, alleging, inter alia, that the general rule enunciated in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), viz., that the doctrine of equitable tolling applies against the

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2 As the district court litigation was determined upon the Petitioner's Motion for Summary Judgment, the foregoing factual recitation is derived from Respondent's Declaration.

government to the same extent that it applies against private parties, should apply with equal force to tax refund suits.[3]

6. In granting the Petitioner's Motion for Summary Judgment, the district court relied principally on the First Circuit's decision in *Oropallo v. United States*, 994 F.2d 25 (1993) cert. denied, 114 S. Ct. 705 (1994), and this Court's decision in *United States v. Dalm*, 494 U.S. 596 (1990). In *Oropallo*, the First Circuit held that the limitations periods imposed by §6511 of the Internal Revenue Code and the doctrine of equitable tolling were "fundamentally inconsistent." In *Dalm*, this Court, limiting its holding in *Bull v. United States*, 295 U.S. 247 (1935) held that the doctrine of equitable recoupment could not be the sole ground for extending the limitations periods of §6511.

7. The court of appeals reversed, Judge Fernandez dissenting. In holding that equitable tolling could, in an appropri-

---

3 The District Court litigation was decided upon Cross-Motions for Summary Judgment. The gravamen of the Respondent's Motion for Summary Judgment was that since the IRS had never assessed the $7,000 remittance, it was not a "payment" of tax, but remained in the nature of a refundable deposit.

ate case, toll the periods of limitations contained in §6511, the court noted that this Court's decision in *Irwin* was subsequent to, and effectively modified, this Court's decision in *Dalm*. In so doing, the court of appeals observed:

> "We think the facts as alleged by Mrs. Brockamp demonstrate why equitable tolling should apply in some tax cases. In this instance, it would be unconscionable to allow the government to retain money that it concedes it was not owed, and may have only received due to a 93 year-old man's senility." [Pet. App. 6a - 7a.]

The court of appeals concluded that a triable issue of fact existed as to Mr. McGill's incompetence. Accordingly, it remanded the case to the district court for further proceedings.

Discussion

Petitioners note that the court of appeal's decision conflicts with the Fourth Circuit's decision in *Webb v. United States*, 66 F.3d 691 (1995) petition for cert. pending, No. 95-1360, the First Circuit's decision in *Oropallo*, supra, and the Eleventh Circuit's decision in *Vintilla v. United States*, 931 F.2d 1444 (1991). [Pet. App. 12-19.] Petitioner's characterization of the conflict of decisions among the circuits is correct, with one exception. In *First Alabama Bank, N.A. v. United States*, 981 F.2d 1226 (1993) the Eleventh Circuit appeared to assume, without comment, that equitable tolling does indeed apply with respect to tax refund claims, thus appearing to create a split between Eleventh Circuit decisions.

One cannot gainsay Petitioner's second reason for granting the Petition, that the conflict that presently exists among the circuits is with respect to an issue of considerable importance in the administration of the tax law, and that at present, whether a disabled taxpayer can or cannot avail him- or herself of equitable tolling is entirely a matter of "geographic happenstance." [Pet. App. 20.]

Respondent takes exception, however, to Petitioner's characterization of the number of post-*Irwin* cases brought by taxpayers claiming equitable tolling as a "substantial volume" of "frequent litigation." [Pet. App. 20.] No such "substantial volume" exists, and Respondent suggests that no such "substantial volume" is likely to develop.

Conclusion

With minor exception, Respondent concurs with Petitioner's stated grounds for granting its petition for a writ of certiorari, but rejects the assumption of a substantial volume of litigation on this issue if it is not.

Respectfully submitted,

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Counsel for Respondent

May 2, 1996

Supreme Court, U.S.
FILED
MAY 13 1996
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(3)

No. 95-1225

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

MARIAN BROCKAMP, ADMINISTRATOR OF THE ESTATE OF STANLEY B. McGILL,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

NICHOLAS T. SCOTT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether a taxpayer, judicially determined to be mentally incompetent, may invoke the doctrine of equitable tolling to suspend or enlarge the limitation periods contained in 26 U.S.C. 6511(a) and (b) to recover an undisputed overpayment of taxes.

TABLE OF CONTENTS

	Page
Opinions Delivered Below	1
Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Denying the Petition	5
I. This case does not affect a great many persons	5
II. It is likely that corrective legislation will be passed by Congress that will moot the issue	6
Conclusion	7
Appendix I	App. 1

TABLE OF AUTHORITIES

Page

CASES:

Brockamp v. United States, 67 F.3d 260 (9th Cir. 1995 No. 95-1225) 4

First Alabama Bank, N.A. v. United States, 981 F.2d 1226 (11th Cir. 1993) 5

Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990) 3, 4, 5, 6, 7

Oropallo v. United States, 994 F.2d 25 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 705 (1994) 4, 5

Rosser v. United States, 9 F.3d 1519 (11th Cir. 1993) 5

Scott v. United States, Nos. 94-15321, 15323 (9th Cir. 1995) 1, 4

United States v. Dalm, 494 U.S. 596 (1990) 3, 5

Vintilla v. United States, 931 F.2d 1444 (11th Cir. 1991) 5

Webb v. United States, 850 F.Supp. 489 (E.D. Va. 1994), *aff'd*, 66 F.3d 691 (4th Cir. 1995), 66 F.3d 691 (4th Cir. 1995) 5

STATUTES:

Internal Revenue Code (26 U.S.C.):

Sec. 6511 ..... 2, 5

Sec. 6511(a) 2, 4, 7

Sec. 6511(b) 2, 4, 7

Sec. 7422 2

MISCELLANEOUS:

Treasury News March 20, 1996 ..... App. 1

OPINIONS DELIVERED BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in *United States v. Scott* is unreported but is set out in Pet. App. 31a-34a. The two opinions of the district court (Pet. App. 35a-59a, 60a-76a) are reported at 795 F.Supp. 1028 and 847 F.Supp. 1499)

JURISDICTION

The judgment of the Court of Appeals in *United States v. Scott* (Pet. App. 34a) was entered on October 5, 1995. On December 27, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 2, 1996. The government filed its writ as of January 31, 1996.

By letter of February 26, 1996, respondent Scott, waived his right to file a brief in opposition.

By letter of March 22, 1996 the Clerk of the Court indicated that the Court requested a response to the petition, to be filed on or before April 23, 1996.

By letter of April 15, 1996 Chief Deputy Clerk, Francis Lorson, informed the respondent that an extension of time to file the response had been granted to and including May 12, 1996.

The petitioner invoked the jurisdiction of this Court under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS DISCUSSED

Section 6511 and 7422 of the Internal Revenue Code, 26 U.S.C. 6511, 7422, are set forth at Pet. 2-4.

STATEMENT OF THE CASE

1. Respondent, Nicholas T. Scott, (taxpayer) overpaid his 1984 taxes in the total amount of $30,096. The mentally incompetent taxpayer filed his 1984-1988 tax returns on November 29, 1989. The government (IRS) refused to refund the undisputed overpayment, alleging the limitation periods contained in 26 U.S.C. 6511 precluded return of the overpayment. The overpayment resulted from the payment of four payments of estimated taxes. Three payments were made by taxpayer's father (Gene Scott) acting under a general power of attorney. The fourth and final payment was made by the taxpayer under the direct physical supervision of taxpayer's father.

2. Taxpayer Scott filed a complaint in the U.S. District Court for Hawaii against the United States and the IRS on January 8, 1992. Scott alleged that his mental incompetency during the relevant tax periods (April 1985 through November 1989) supported the application of the doctrine of equitable tolling to the limitation periods contained in the tax refunds statutes, especially 26 U.S.C. Sec. 6511(a) and (b).

In a published opinion dated June 4, 1992, Chief Judge Alan Kay issued an opinion (795 F.Supp. 1028 D. Hawaii 1992 (Scott I)) denying the Government's motion to dismiss for lack of jurisdiction and holding that tax refund claims are subject to equitable tolling.

The district court based its decision on an analysis of the recently decided *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990) case. *Irwin* held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants is applicable to suits against the United States." 498 U.S. at 95-96 (Pet. App. 74).

Judge Kay declined to follow *U.S. v. Dalm*, 494 U.S. 596 (1990), a case which the Government relied on heavily in both lower courts. The Government asserted that *Dalm* stands for the proposition that equitable tolling does not apply to tax refund cases. The court held that *Dalm* dealt with the narrow issue of equitable recoupment and not the broad issue of equitable tolling. The *Dalm* case, dealt with an entirely different equitable principle and thus *Irwin*, and *Dalm* were distinguishable. (Pet. App. 68a-71a).

Additionally, Judge Kay held that mental incompetence can in the proper circumstances, toll the statute of limitations in a tax refund case. His decision was based on fundamental principles of equity and fairness. (Pet. App. 76a).

A bench trial regarding the taxpayers competence was held from October 5, 1993 through October 7, 1993.

After reviewing extensive trial evidence, including the reports and testimony of two highly qualified government and taxpayer medical experts, and extensive deposition testimony of numerous lay witnesses, the trial judge concluded that the taxpayer was mentally incompetent during the relevant time period from January 1985 through November 1989.

Judge Kay again held that Sec. 6511(a) and (b) were subject to the doctrine of equitable tolling. The court declined to apply the recently decided First Circuit Court of Appeals decision of *Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993) finding the analysis imperfect. (Pet. App. 47a-51a).

3. On appeal, the court of appeals in a split decision concluded that Sec. 6511 was subject to equitable tolling and therefore affirmed the district courts opinion.[1]

Judge Wiggins, writing for the majority applied the general rule as announced in *Irwin* that " . . . the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress of course, may provide otherwise if it wishes to do so." *Irwin*, 95-96, (Pet. App. 4a). In essence, the majority held *Irwin* controlling in the absence of contrary congressional intent.

The majority also refused to follow the First Circuits opinion in the *Oropallo* case, noting that since the Ninth Circuit reads Sec. 6511(a) as an effective statute of limitations and not "illusory," the court was not bound to

[1] *Scott v. United States* (Nos. 94-5321, 15323 9th Cir. October 5, 1995) and *Brockamp v. United States*, 67 F.3d 260 (9th Cir. 1995) were argued the same day and the opinions were issued the same day. The rationale for the published *Brockamp* decision is equally applicable to the *Scott* decision. (See Pet. App. 33a-34a) The *Brockamp* decision reversed a district court holding not allowing equitable tolling in tax refund actions and remanded the case to the district court for a determination of the taxpayers mental competency.

follow the *Oropallo* analysis. (See Pet. App. footnote 1, pages 5a-7a).

Finally, relying on several post *Irwin* decisions the court held that mental incompetence can toll a statute of limitations (Pet. App. 7a-8a).

In his dissent Judge Fernandez outlined and synthesized all of the arguments opposing equitable tolling in tax refund cases and seemingly adopted all of them. In essence he argued that *Dalm* controls and not *Irwin*. Additionally he opined that Sec. 6511(b) acts like a statute of repose rather than as a statute of limitations.

REASONS FOR DENYING THE PETITION

I. This Case Does Not Affect a Great Many Persons

Three circuit courts have directly passed on the issue of the applicability of equitable tolling to Sec. 6511. (*Oropallo v. U.S.*, 1st Cir. 1993; *Webb v. U.S.*, 4th Cir. 1995; and *Brockamp and Scott*, 9th Cir. 1995) Additionally, the 11th Circuit in an indecisive trio of cases has yielded a mixed set of opinions on the applicability of the doctrine. (See *Vintilla v. U.S.*, 531 F.2d 1444 (11th Cir. 1991) and compare with *First Alabama Bank N.A. v. U.S.*, 981 F.2d 1226 (11th Cir. 1993) and *Rosser v. U.S.*, 9 F.3d 1519 (11th Cir. 1993).

Each court that has considered the issue has issued an opinion based on a different analysis of Sec. 6511 and *Irwin*.

Respondent submits that this Court should allow additional lower courts to consider this matter, in order

that this Court have the benefit of additional judicial and scholarly consideration before taking this matter up.

The existence of a present conflict is not of overwhelming weight when balanced with the relatively few individuals who are currently effected by the rulings.

In the 5-1/2 years since *Irwin* was decided there have been a mere handful of cases in the lower courts interpreting *Irwin*, either applying or not applying equitable tolling to tax refund actions.

The government, in its petition and in briefs submitted in lower court actions has raised the spectre of a flood of incompetent taxpayers requesting refunds of moneys which they overpaid the IRS. The floodgates have *not* opened, there are less than a dozen reported cases in the 5-1/2 years since *Irwin*. There is no widespread litigation on the issue. The Court has more pressing issues to consider than one which, given the hindsight of many years, actually affects few individuals.

II. It is Likely That Corrective Legislation Will Be Passed by Congress That will Moot the Issue.

On January 31, 1996, President Clinton requested the Treasury Department develop a proposal to submit to Congress to assure that taxpayers who are mentally incapacitated are not harshly treated by the time limitation rules for seeking a refund.

Treasury has developed and announced such a proposal (Resp. App. 1) This proposal was submitted on or about March 21, 1996 to the House Ways and Means and Senate Finance Committees.

Given that this proposed legislation strikes an effective balance between the Government's need for revenue and the unfairness and inequity of allowing the Government to retain the moneys of incapacitated taxpayers, to which it is not entitled, there is a substantial likelihood that this proposal will pass in its present form.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

If this court does grant the petition for certiorari, Respondent, Nicholas Scott, requests the opportunity to fully brief the issues involved, including but not limited to; and analysis of the impact of the *Irwin* decision and a complete statutory analysis of the language of 26 U.S.C. 6511(a) and (b).

Respectfully submitted,

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DEPARTMENT OF THE TREASURY

TREASURY [SEAL] NEWS

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FOR IMMEDIATE RELEASE Contact: Jon Murchinson
March 20, 1996 (202) 622-2960

TREASURY ANNOUNCES PROPOSAL TO EXTEND THE TIME LIMIT FOR CLAIMING TAX REFUNDS WHERE TAXPAYERS ARE INCAPACITATED

On January 31, 1996, the President directed Treasury to develop a proposal to assure that taxpayers who are unable to handle their affairs for compelling reasons are not harshly treated by the time limit rules that apply for seeking a tax refund.

In response to this request Treasury announced today that it will recommend to Congress a proposal to amend the time limit within which claims for tax refunds must be made, extending the time in situations involving incapacitated taxpayers.

Under the proposal, the limitations period in the case of individual taxpayers would be extended for the period of time a taxpayer was subject to disability, in effect extending the statutory time by the period of the disability. "Disability" would be defined to include judicial determinations of incompetency, commitment to mental institutions or hospitals, or other debilitating physical,

mental or psychological conditions that prevent the taxpayer from managing his or her financial affairs.

Secretary Rubin stated, "The President and I believe that we should have a tax system that is responsive to the personal hardships faced by incapacitated taxpayers. This proposal meets these goals."

MOTION FILED
MAY 10 1996

No. 95-1225

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

MARIAN BROCKAMP, Administrator
of the Estate of Stanley B. McGill, *et al.*,
Respondents.

**On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* VINCENT P. TASSINARI IN SUPPORT OF PETITION FOR WRIT OF CERTIFICATION

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27 pp

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, Vincent P. Tassinari respectfully moves this Court for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certorari. Because this motion and the attached brief are filed within the time allowed for filing a brief in opposition to the petition for a writ of certiorari (Sunday, May 12, 1996), this motion and the attached brief are timely under Rule 37.2. This motion and brief has been served on all separately represented parties per Rule 29.3 and proof of service filed with the Clerk. In addition, forty copies of this motion and brief with cream color covers are filed with the Clerk.

The original written consent of Petitioner United States addressed to counsel for the *amicus* indicating such consent is filed with the Clerk. In a phone conversation with Respondent Scott on May 1, 1996, Respondent Scott orally agreed to give his consent after receiving a copy of the attached brief. Respondent *Scott* and Respondent *Brockamp* have declined written consent.

• Nature of Applicant's Interest •

It has been said that a true *amicus curiae* is without interest in litigation in which the *amicus* brief appears and is but "bystander" whose mission is to aid the court and to act only for personal benefit of court. *Kline v Weaver*, 348 SW2d 379 (CA Texas 1961). *Amicus* Vincent P. Tassinari ("Tassinari") earned a bachelor's degree in mechanical engineering from Purdue University in Indiana in 1986, has

seven years experience as a professional engineer, and is presently a graduate law student in the LL.M. (Tax) program at Golden Gate University School of Law in San Francisco, California. He submits this brief through his next best friend, counsel of record, representing no institution, group, or association. Although Tassinari supports the petition, Tassinari supports neither party on the merits. His sole interest is the development of the law in the area of equitable tolling, particularly as it relates to tax refunds. As such, *amicus* finds himself in the unique position of supporting the United State's petition for a writ of certiorari, in opposition to the respondents' position, and supporting the affirmance of the Ninth Circuits holding in favor of the respondents, in opposition to the petitioner's position.

In addressing whether Congress intended to exclude the doctrine of equitable tolling timeliness provisions of 26 USC 6511, Tassinari approached this tax question as an impartial outsider under an exercise of scholarly analysis. Because the context in which Tassinari approached this issue is necessarily divergent from the goals of the opposing parties, Tassinari is in a position to both view this issue in a different perspective and to emphasize special matters relating to such a perspective, thereby serving as a true friend of the Court.

• Particular Value of this Brief •

In particular, Tassinari's *amicus* brief will be of value to the Court because:

- this brief cites two Eleventh Circuit cases that are highly relevant to that circuits position on equitable tolling that are not cited by Petitioner United States. (See, footnotes 3 and 5 of *amicus* brief).
- this brief offers views counter to the petitioner's for the holdings in *Vintilla, Dalm, Oropallo, Webb,* and *Git;*
- this brief analyzes, in detail, legislative intent to find that Congress did not intend to exclude the doctrine of equitable tolling from I.R.C. §6511 and equitably tolling the time limits of §6511 will not conflict with §6511's purpose or intent;
- this brief helps to project the potential, far reaching legal impact of affirming the Ninth Circuit's holding in *Brockamp;*
- and, this brief helps to project the minimum fiscal impact of affirming the Ninth Circuit's holding in *Brockamp.*

• Conclusion •

For the above reasons, *amicus* respectfully requests that his motion for leave to file the attached brief be granted.

Respectfully submitted,

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DATED: May 12, 1996

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. APPLICATION OF THE *IRWIN* PRESUMPTION TO THE TIME LIMITS OF §6511(a) 4

a. Introduction: Congressional Waiver of Sovereign Immunity in Tax Refund Cases 4

b. Rule for Determining Whether the Equitable Tolling Doctrine Applies to a Particular Statute 7

c. Applying *Irwin* to Determine Whether the Statute §6511(a) is Subject to the Equitable Tolling Doctrine 9

d. Conclusion that the Doctrine of Equitable Tolling Applies to the Tax Refund Statute §6511(a) 17

II. PROJECTED LEGAL AND FISCAL IMPACT OF AFFIRMING *BROCKAMP* 17

a. Impact on the Judiciary 17

b. Impact on the Public Fisc 19

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Brockamp v. United States, 67 F.3d 260 (9th Cir. 1995)..... *passim*
Bull v. United States, 295 U.S. 247 (1935)..... 3
Burnett v. New York Central Railroad, 380 U.S. 424 (1965)..... 6
Cada v. Baxter Healthcare Corp., 920 F.2d 446 (7th Cir. 1990)(Posner, J.)..... 15
Cervantes v. San Diego, 5 F.3d 1273 (9th Cir. 1993)..... 14
Comm'r v. Lundy, 116 S. Ct. 647, 1996 U.S. LEXIS 694 (1996)..... 12, 16
Conley v. Gibson, 355 U.S. 41 (1957)..... 14
First Alabama Bank v. United States, 981 F.2d 1226 (11th Cir. 1993)..... 15
Fogel v. United States, 1995 U.S. Dist. LEXIS 13686 (WDWI 1995)..... 13
Git v. United States, 1996 U.S. App. LEXIS 86 (8th Cir. 1996)(unpublished)..... 1, 3
Holmberg v. Armbrecht, 327 U.S. 392 (1946).....5, 6, 12, 14
Indian Towing Co. v. United States, 350 U.S. 61 (1955)..... 6, 7
Irwin v. Veterans Affairs, 498 U.S. 89 (1990)..... *passim*
Johnsen v. United States, 758 F.Supp. 834 (EDNY 1991)..... 11
Kelly v. Robinson, 479 U.S. 36 (1986)..... 13
Lampf v. Gilbertson, 501 U.S. 350 (1991)..... 3, 7, 8, 11
Lee v. United States, 1995 U.S. App. LEXIS 27156 (6th Cir. 1995)..... 13
Library of Congress v. Shaw, 478 U.S. 310 (1986)..... 4

Mutual Assurance v. United States, 56 F.3d 1353 (11th Cir. 1995)..... 2
Oropallo v. United States, 994 F.2d 25 (1st Cir. 1993)..... 3, 11, 13, 14
Rosser v. United States, 9 F.3d 1519 (11th Cir. 1993)..... 15
Ryan v. United States, 64 F.3d 1516 (11th Cir. 1995)..... 2
Scott v. United States, 795 F.Supp. 1028 (D. Haw. 1992)("*Scott I*")..... 11
Scott v. United States, 847 F.Supp. 1499 (D. Haw. 1993)("*Scott II*")..... 12, 16
Snyder v. United States, 616 F.2d 1187 (10th Cir. 1980)..... 13
United States v. Dalm, 494 U.S. 596 (1990)..... 2, 3, 5
United States v. Shaw, 309 U.S. 495 (1940)..... 4
United States v. Testan, 424 U.S. 392 (1976)..... 4
United States v. Williams, 115 S. Ct. 1611; 1995 U.S. LEXIS 3036 (1995)..... 4
Vintilla v. United States, 931 F.2d 1444 (11th Cir. 1991)..... 1, 2, 15
Webb v. United States, 66 F.3d 691 (4th Cir. 1995)..... 1, 3, 8, 10

STATUTES

Internal Revenue Code Sections

26 USC
1311, 1312, 1313, 1314..... 18
2011(c)..... 18
2014(e)..... 18
2015 18
6013(b)(2)(B)..... 18

6213..... 18
6226..... 18
6228..... 18
6511..... 1, 10, 11, 17
6511(a)..... *passim*
6511(b)(1)..... 12, 17
6511(b)(2)..... 17
6511(b)(2)(A)..... *passim*
6511(c)(1)..... 17
6511(d)(1), (d)(2), (d)(3), (d)(4), (d)(5), (d)(6)..... 17
6511(g)..... 17
6696(d)(2)..... 18
6703..... 18
7422(a)..... 5, 15
7426..... 18
7429..... 18

Federal Rules of Civil Procedure Sections

28 USC
1346..... 5
1346(a)..... 14, 16
1346(a)(1)..... 5

LEGISLATIVE HISTORY

H.R. Rep. No. 133, 100th Cong., 1st Sess. 189 (Dec. 1, 1987)..... 10
H.R. Rep. No. 1337, 83rd Cong., 2 Sess., reprinted in 1954 U.S. Code Cong. & Admin. News 4563..... 11
S. Rep. No. 398, 68th Cong., 1st Sess. 33 (1924)..... 13
S. Rep. No. 1622, 83rd Cong., 2 Sess., reprinted in 1954 U.S. Code Cong. & Admin. News 5235..... 11

INTEREST OF THE *AMICUS CURIAE*

The interest of Vincent P. Tassinari as *amicus curiae* is set forth in the preceding motion for leave to file this brief.

SUMMARY OF ARGUMENT

Since the passage of the Supreme Court case of *Irwin v. Veterans Affairs* on October 1, 1990, five circuit courts have addressed the issue of whether Congress intended to exclude the doctrine of equitable tolling from the time periods of 26 U.S.C. §6511(a).[1] Because there is a conflict on this issue between the position of the First and Fourth Circuit and the position of the Ninth Circuit, this Court should grant a writ of certiorari so that the treatment afforded to taxpayers who claim an equitable tolling of the statutory limitations upon tax refunds will not differ "based solely upon geographic happenstance." Because Congress did not intend to exclude the equitable tolling doctrine from §6511 and equitably tolling the time limits of §6511 will not conflict with §6511's purpose or intent, *Brockamp's* conclusion, that the statute of limitations provided in §6511 may be equitably tolled, should be affirmed by this Court.

Although upholding *Brockamp's* conclusion may open "the flood gates of litigation," the fiscal impact of such a holding will be limited.

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[1] **May 22, 1991**: *Vintilla v. United States*, 931 F.2d 1444 (11th Cir. 1991); **May 24, 1993**: *Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993); **October 2, 1995**: *Welch v. United States*, 66 F.3d 691 (4th Cir. 1995); **October 5, 1995**: *Brockamp v. United States*, 67 F.3d 260 (9th Cir. 1995); **January 4, 1996**: *Git v. United States*, 1996 U.S. App. LEXIS 86 (8th Cir. 1996) (unpublished).

Because of page limitation on this brief, discussion of the 11th, 8th, 1st, and 4th Circuits positions will be summarized below from *Amicus'* LL.M. (Tax) thesis. *Amicus* will supply the reader of this brief a copy of this thesis upon request.

The **11th Circuit's** holding in *Vintilla v. United States* and its progeny indicate that the holding in *Vintilla* was specific to Mr. and Mrs. Vintilla and not a general holding that the Eleventh Circuit interpreted *Dalm* to mean that 'the doctrine of equitable tolling does not apply to tax refund suits.' For example, in *Mutual Assurance v. United States*[2], the Eleventh Circuit cited *Vintilla* for the proposition that "a taxpayer who fails to file an administrative claim for refund within the period set forth in I.R.C. § 6511(a) is barred from filing a refund suit in the district courts."[3] In *Ryan v. United States*[4], the court cited *Vintilla* for the proposition that "a taxpayer may not sue the United States for a tax refund until it first files a refund claim with the government."[5] Among other reasons, because neither *Mutual Assurance* nor *Ryan* cited *Vintilla* for the proposition that "equity could not toll the

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[2] *Mutual Assurance v. United States*, 56 F.3d 1353 (11th Cir. 1995).

[3] *Mutual Assurance*, 56 F.3d at 1356. Although this case was available July 3, 1995, the Petitioner United States failed to cite this case on point as authority in its January 31, 1996 petition to this Court.

[4] *Ryan v. United States*, 64 F.3d 1516 (11th Cir. 1995).

[5] *Ryan*, 64 F.3d at 1520-21. In addition to failing to address the *Mutual Assurance* case, the Petitioner United States failed to cite this case on point as authority in its January 31, 1996 petition to this Court. This *Ryan* case was available on September 26, 1995, four months prior to the United States petition.

limitations period," it is unlikely that the *Vintilla* equity holding extended beyond Mr. and Mrs. Vintilla.

The **Court's** own holding in *United States v. Dalm*[6] indicates that the primary goal in *Dalm* was to further elaborate on the jurisdiction element of equitable recoupment in light of *Bull v. United States*[7] and its progeny, not to create a holding on the issue of equitable tolling of refund suits. Further, the tax judicial doctrine of equitable recoupment and the tax judicial doctrine of equitable tolling are two completely different tax doctrines.

Similar in its position to that of the 11th Circuit, the **8th Circuit's** holding in the unpublished opinion of *Git v. United* States indicates that this issue is still open in that circuit.

The **1st Circuit's** holding in *Oropallo v. United States* - equitable tolling does not apply to §6511 time limitations - does not hold up under close scrutiny for four reasons. First, the courts general "analogy to *Lampf*" argument did not account for "the context" upon which the *Lampf* conclusions were dependent. Second, *Oropallo's* analogy of §6511(a) to §9(e)'s 1-year time limitation did not account for the fact that the 1-year limit of §9(e) already incorporated principles of equity. Third, the court's analogy of §6511(b)(2)(A) to §9(e)'s 3-year outside limit is based upon circular logic. And last, the court over emphasized the legal weight given to statutory captions.

The **4th Circuits** holding in *Webb v. United States* - equitable tolling must already apply in a particular action against private defendants before the *Irwin* presumption can be applied to government defendants - and its conclusion -

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[6] *United States v. Dalm*, 494 U.S. 596 (1990).

[7] *Bull v. United States*, 295 U.S. 247 (1935).

Internal Revenue Code tax refund suits are excluded from the rebuttable presumption in *Irwin* - misread the **purpose** of the *Irwin* holding in suits against the government and, as a result, confused the **general rule** of *Irwin* with the **effect** of the *Irwin* holding in Title VII suits.

ARGUMENT

I. APPLICATION OF THE IRWIN PRESUMPTION TO THE TIME LIMITS OF §6511(a)

a. Introduction: Congressional Waiver of Sovereign Immunity in Tax Refund Cases

If Congress had never established a mechanism by which taxpayers could claim refunds against the government, the government would be completely immune from such suits under the doctrine of sovereign immunity.[8] This was the state of tax refund law prior to 1911. At that time, a taxpayer could only bring an assumpsit refund action against the tax collector personally, rather than against the United States government, to obtain a refund.[9] However, in 1911, Congress waived this complete immunity when it

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[8] Sovereign immunity prevents a federal court from exercising subject matter jurisdiction over suits against the government. *United States v. Shaw*, 309 U.S. 495, 500-01 (1940). See also, *United States v. Testan*, 424 U.S. 392, 399 (1976); *Library of Congress v. Shaw*, 478 U.S. 310, 315 (1986).

[9] *United States v. Williams*, 115 S. Ct. 1611; 1995 U.S. LEXIS 3036, *11 (1995)(citing *Ferguson, Jurisdictional Problems in Federal Tax Controversies*, 48 Iowa L. Rev. 312, 327 (1963).).

enacted the predecessor to §1346(a)(1) of Title 28.[10] Section 1346(a)(1) grants the district courts general jurisdiction over suits against the United States "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected."[11] However, §1346(a)(1) must be read in conformity with other statutory provisions which qualify a taxpayer's right to bring a refund suit.[12] Two such statutory provisions are §6511(a) and §7422(a) of Title 26.[13]

Section 6511(a) provides that "claim for credit or refund of an overpayment of any tax imposed by this title [26] in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed ...". Section 7422(a) provides that "no suit ... shall be maintained ... for the recovery of any internal revenue tax ... until a claim for refund or credit has been duly filed ... according to the provisions of law ... and the regulations ...". One such provision of law was set out in the 1946 Supreme Court case of *Holmberg v. Armbrecht*.[14]

In *Holmberg*, the Court held that, to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations, provided the application is done in conjunction

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[10] 28 USC 1346 was based on a consolidation of Revenue Acts, the first Act being March 3, 1911, ch 231, §24, para. 20, 36 Stat. 1093. These acts were originally contained in the former 28 USC §§ 41(20), 931(a) and 932.

[11] 28 USC 1346(a)(1) (1995).

[12] *Dalm*, 494 U.S. at 601.

[13] *Dalm*, 494 U.S. at 601-602.

[14] *Holmberg v. Armbrecht*, 327 U.S. 392 (1946).

with the legislative scheme.[15] Nineteen years later, in the 1965 case of *Burnett v. New York Central Railroad*[16], the Court adopted the congressional intent analysis in equitable tolling cases.[17]

In the 1990 case of *Irwin v. Veterans Affairs*[18], the Court again reiterated its position on assessing legislative intent when it comes to interpreting statutory time limits as being subject to the doctrine of equitable tolling. In *Irwin*, the Court's express purpose was to "adopt a more general rule to govern the applicability of equitable tolling in suits against the Government" because prior Supreme Court cases "dealing with the effect of time limits in suits against the Government [were] not entirely consistent."[19]

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[15] *Holmberg*, 327 U.S. at 401.

[16] *Burnett v. New York Central R.R.*, 380 U.S. 424 (1965).

[17] *Burnett*, 380 U.S. at 432, 436 (Thereby disapproving of the use of the jurisdictional-substantive-procedural tricostate skeletal analysis to determine whether a statutory time limitation may be tolled.).

[18] *Irwin v. Veterans Affairs*, 498 U.S. 89 (1990).

[19] *Irwin*, 498 U.S. at 94-95. One possibility for this inconsistency is the emphasis alternatively sent from two lines of Supreme Court cases that have developed from the 1955 case of *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). ***Dalm***: "Although we should not construe a time-bar provision unduly restrictively, we must be careful not to interpret it in a manner that would extend the waiver beyond that which Congress intended." *Dalm*, 494 U.S. at 608(quoting *Block v. North Dakota*, 461 U.S. 273, 287 (1983))(quoting *United States v. Kubrick*, 444 U.S. 111, 117-118 (1979))(referring to *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955))("Of course, when dealing with a

b. Rule for Determining Whether the Equitable Tolling Doctrine Applies to a Particular Statute

The *Irwin* Court's general rule was developed and set out as follows. "A waiver of sovereign immunity cannot be implied but must be unequivocally expressed."[20] However, "the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity."[21] The Court therefore held as follows. Time requirements in statutes are customarily subject to the equitable tolling doctrine.[22] Once Congress has made a waiver of sovereign

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statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction."). ***Irwin***: "We must be careful not to assume the authority to narrow the waiver that Congress intended, or to construe the waiver 'unduly restrictively'." *Irwin*, 498 U.S. at 94 (quoting *Bowen v. City of New York*, 476 U.S. 467, 479 (1986))(quoting *United States v. Kubrick*, 444 U.S. 111, 118 (1979))(referring to *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955))("Neither should [this Court,] as a self-constituted guardian of the Treasury[,] import immunity back into a statute designed to limit it.").

[20] *Irwin*, 498 U.S. at 95.

[21] *Irwin*, 498 U.S. at 96.

[22] **This is known as the '*Irwin* presumption'**. The original finding in *Irwin* read "time requirements in [statutes cited in] lawsuits *between private litigants* are customarily subject to [the] equitable tolling [doctrine]." *Irwin*, 498 U.S. at 95 (emphasis added). The Supreme Court removed the internal quotation "between private litigants" from this *Irwin* finding in the *Lampf* case. *Lampf v. Gilbertson*, 501 U.S. 350, 363 (1991). The removal of this internal quotation can only mean that the *Irwin* tolling

immunity by providing for such time limits, the court must assess legislative intent to determine whether the statutory limitation period is subject to the doctrine of equitable tolling.[23] One realistic assessment[24] of legislative intent in

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principle also applies unconditionally to statutes which allow a private litigant plaintiff to sue a federal government defendant. This contradicts the *Webb* court's conclusion that the Irwin presumption does not apply towards statutes that only permit lawsuits against a federal government defendant. In the *Webb* opinion, the Fourth Circuit cited this same phrase from *Lampf* as though the Fourth Circuit themselves omitted the internal quotations. See *Webb*, 66 F.3d at 699 ('internal quotations omitted').

[23] *Irwin*, 498 U.S. at 95. This 'legislative intent analysis' is required in order to rebut the presumption that time requirements in statutes are customarily subject to equitable tolling. The *Lampf* Court engaged in such an analysis, citing as authority *Irwin's* finding that "time requirements in [statutes] ... are customarily subject to equitable tolling." *Lampf*, 501 U.S. at 363. At present, some district courts avoid this step by claiming that time limit statutes are "jurisdictional" and thus may not be tolled. This Court's *Brockamp* holding would be a good means to reiterate the Court's disapproval of the conclusory "jurisdictional" method of analysis.

[24] The *Irwin* Court's use of the words "... a realistic assessment ..." invites the obvious conclusion that this is but one means to assess legislative intent. See, *Irwin*, 498 U.S. at 95. The *Webb* court was able to use the language of *Irwin* to interpret the holding in *Irwin* to meant that *the only way* the *Irwin* presumption can be applied against a government defendant is if equitable tolling already exists in a particular action against

determining whether Congress has rebutted the equitable tolling presumption for the statutory limitation period in question is that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States."[25] Congress, of course, may provide that the statutory time limits are not subject to the doctrine of equitable tolling, if it wishes to do so.[26]

c. Applying *Irwin* to Determine Whether the Statute §6511(a) is Subject to the Equitable Tolling Doctrine

Merely by enacting time limits for a tax refund suit against the Government, Congress waived the Government's sovereign immunity in such a suit back in 1911.[27] These time limits in §6511(a) will be subject to the doctrine of equitable

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private defendants. *Webb*, 66 F.3d at 697. However, the fact that a statute is already subject to the doctrine of equitable tolling in an action against private defendants is merely one means of realistically assessing legislative intent as to whether the *Irwin* presumption can be applied towards a statute and thus against a government defendant.

[25] *Irwin*, 498 U.S. at 95.

[26] The sentence "Congress, of course, may provide 'otherwise' if it wishes to do so" is consistent with the *Irwin* Court's use of the permissive phrase "... should also apply ..." in its holding. See, *Irwin*, 498 U.S. at 96. The only two logical options in which Congress can "provide otherwise" with respect to equitable tolling are to entirely bar the doctrine from the statutory limitation period or to limit the grounds on which equity will apply to the claimant.

[27] *Irwin*, 498 U.S. at 96. See also, Footnote 10, this brief.

tolling unless Congress has provided otherwise.[28] In *Webb*, the Fourth Circuit correctly pointed out that "tax refund suits are always brought against the government, never against private parties."[29] Thus, because there can not be a rebuttable presumption of equitable tolling applicable to suits against private defendants under §6511(a), the useful principle of interpretation set out in *Irwin* is not useful to interpret legislative intent for this particular statute. Therefore, we still need to analyze legislative intent.

To determine whether Congress has intended to exclude §6511(a) from the doctrine of equitable tolling, we must look at the statutory language, purpose and legislative history. One Circuit court which has dealt with the meaning of §6511(a) with respect to equitable tolling is the Ninth Circuit. In *Brockamp v. United States*[30], the Ninth Circuit conclude that, based on the *Irwin* presumption, the doctrine of equitable tolling applies to tax refund suits under §6511(a). The court analyzed whether Congress intended to exclude equitable tolling from §6511 and found that:

> "Congress has never expressed any intention that equitable tolling should not apply to §6511.[31] The specific language of the statute does not speak to the application of equitable tolling

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[28] *Irwin*, 498 U.S. at 95.

[29] *Webb*, 66 F.3d at 698.

[30] *Brockamp v. United States*, 67 F.3d 260 (9th Cir. 1995).

[31] *Amicus'* own exhaustive search only turn up Congressional Record -- House, H.R. Rep. No. 133, 100th Cong., 1st Sess. 189 (Dec. 1, 1987)(Congressional waiver of §6511(b) overpayment limit for the estate of Commodore Perry Miller).

principles.[32] Additionally, since the Supreme Court decided *Irwin* four years ago, Congress has done nothing to indicate that equitable tolling does not apply to §6511. Furthermore, as the court in *Johnsen v. United States* noted, the legislative history of §6511 "is absolutely devoid of any indications that Congress intended to preclude such equitable tolling in tax refund actions." 758 F.Supp. 834, 835-6 (EDNY 1991), quoted in *Scott v. United States*, 795 F.Supp. 1028 (D. Haw. 1992).[33] We hold that in the absence of congressional action that indicates to the contrary, the statute of limitations provided in §6511 may be equitably tolled."[34]

Although Congress did not intend to exclude the equitable tolling doctrine from §6511, absent this Congressional intent, we still must ask whether equitably tolling the time limits of §6511 would conflict with §6511's

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[32] This is contrary to the 1-year period of §9(e) in *Lampf*, where the statutory language "one year *after* the discovery" incorporates principles of equity in the statutory language, thus making tolling unnecessary. *Lampf*, 501 U.S. at 363. Cf., *Oropallo*, 994 F.2d at 30 (§6511(a) analogous to §9(e)'s 1-year period.).

[33] See, H.R. Rep. No. 1337, 83rd Cong., 2 Sess., reprinted in 1954 U.S. Code Cong. & Admin. News 4563; S. Rep. No. 1622, 83rd Cong., 2 Sess., reprinted in 1954 U.S. Code Cong. & Admin. News 5235.

[34] *Brockamp*, 67 F.3d at 262(italics and footnotes supplied).

purpose or intent.[35] Generally, the time schemes set out in §6511 incorporate by reference the time period of §6511(a). In particular, the 3-year period of §6511(b)(2)(A) is prescribed by §6511(a).[36] Thus, if a court finds that the equitable grounds exist to toll the 3-year period of §6511(a), then the 3-year period of §6511(b)(2)(A) would likewise be tolled[37] and the timely filed claim would be subject to §6511(b)(2)(A).[38] The main legislative intent question comes down to this: if this Court finds that the doctrine of equitable tolling applies to §6511(a) in all cases, what significance will §6511(b)(2)(A) have, in a subsequent case, where a court finds that the grounds for equitable tolling exists?

First we need to understand the present significance of §6511(b)(2)(A). By the language of §6511(b)(2)(A), this subsection operates to limit the AMOUNT of credit or refund available for a timely filed claim. But the language of §6511(b)(2)(A) gives no indication as to why or under what circumstances Congress intended to limit the AMOUNT of credit or refund. Thus, for the present significance of

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[35] Whether "... the application is done in conjunction with the legislative scheme." *Holmberg*, 327 U.S. at 401. Also see Footnote 15, this brief.

[36] *Comm'r v. Lundy*, 116 S. Ct. 647, 1996 U.S. LEXIS 694, *9.

[37] *Lundy*, 1996 U.S. LEXIS at *9. The time limits for the §6511(b)(1) filing deadline would similarly be affected by the time limits of §6511(a).

[38] Thus, *Scott II* correctly found that "§6511(b)(2)(A) in no way prevents the bringing of a lawsuit." *Scott v. United States*, 847 F.Supp. 1499, 1505 (D. Haw. 1993)("*Scott II*").

§6511(b)(2)(A), we need to look at Congress's intent.[39] The 6th, 9th and 10th Circuits have found that Congress's intent in passing §6511(b)(2)(A) was to prevent a taxpayer from "reviving a stale refund claim" by intentionally making an overpayment for one tax year and then filing a new refund claim for the entire overpayment.[40]

Next, we need to understand what it means if this Court finds that the doctrine of equitable tolling applies to §6511(a). If this Court finds that the doctrine of equitable tolling applies to §6511(a), then the time periods listed in §6511(b)(2)(A) would also be affected because §6511(b)(2)(A) incorporates §6511(a)'s time limit by

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[39] *Kelly v. Robinson*, 479 U.S. 36, 43 (1986). Statutory language is rarely so clear as to make totally irrelevant the legislative purpose or history.

[40] "In order that a late payment of a small portion of the tax due may not extend the time for filing a claim for refund of the entire tax, a limitation has been inserted by the committee restricting the amount of a credit or refund to the portion of the tax paid during the four [now three] years immediately preceding the filing of the claim." S. Rep. No. 398, 68th Cong., 1st Sess. 33 (1924)(act established the predecessor of §6511(b)(2)(A))(as quoted in *Lee v. United States*, 1995 U.S. App. LEXIS 27156, *9 (6th Cir. 1995). See, also , *Brockamp*, 67 F.3d at 265-266(dissent quoting *Snyder v. United States*, 616 F.2d 1187, 1188 (10th Cir. 1980)); *Fogel v. United States*, 1995 U.S. Dist. LEXIS 13686, *4 (WDWI 1995). Thus, unlike the three year period in *Lampf*, the three-year period of §6511(b)(2)(A), in the context of a tax refund suit, has significance other than imposing an "outside limit". Cf., *Oropallo*, 994 F.2d at 27-8 (holding §6511(b)(2)(A)'s legislative significance can only be as an "outside limit".).

reference.[41] Also, under such a finding, a court would have subject matter jurisdiction as a court of equity to hear the grounds for equitable tolling in the case before that court.[42] In addition, even if there is a general rule that states that the doctrine of equitable tolling applies to §6511(a) in all cases, a taxpayer would still need to prove that the taxpayer's situation satisfies the narrow grounds for equitable tolling on a case by case basis in order to then be heard on the merits of the taxpayer's tax refund claim.[43]

If the taxpayer fails to satisfy the grounds for equitable tolling, then the taxpayer will not be entitled to present the merits of the taxpayer's case for a refund claim because the 3-year period of §6511(a) will have run. In this situation - where the grounds for equitable tolling do not exist and the 3-year period has run - the court lacks subject matter jurisdiction under §1346(a) to hear the claim for refund and the taxpayer will be barred from obtaining a refund. Here, §6511(b)(2)(A) will have its same present significance -

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[41] Thus, there is no merit to the *Oropallo* court's claim that §6511(b) establishes an additional limitations period, separate from the three year time limitation period in §6511(a). See, *Oropallo*, 994 F.2d at 27.

[42] The equitable tolling doctrine is read into every federal statute of limitations, and the decision whether the doctrine should be applied lies within the sound discretion of the court. *Holmberg*, 327 U.S. at 398; *Conley v. Gibson*, 355 U.S. 41 (1957). Because the applicability of the grounds for equitable tolling often depends on matters outside the pleadings, it "is not generally amenable to resolution on a Rule 12(b)(6) motion." *Cervantes v. San Diego*, 5 F.3d 1273, 1276 (9th Cir. 1993).

[43] *Irwin*, 498 U.S. at 96.

preventing a taxpayer from obtaining a refund by reviving a stale refund claim through a series of two or more overpayments.

In the situation of a taxpayer who meets the narrow grounds of equitable tolling, the 3-year period is stopped from running by the grounds for equitable tolling, even if the date on which the statute of limitations begins to run has passed.[44] Any refund claim filed within a reasonable time[45] after the equitable period has lapsed[46] would be timely under §6511(a) and timely under all other time limits which incorporate by reference §6511(a), including §6511(b)(2)(A). Because such a refund claim would be timely, the claim is duly filed under 26 USC 7422(a) and thus the court will

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[44] *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990)(Posner, J.). This case has a very good discussion of equitable tolling and equitable estoppel. Cf. with *Vintilla, First Alabama Bank v. United States*, 981 F.2d 1226 (11th Cir. 1993) and *Rosser v. United States*, 9 F.3d 1519 (11th Cir. 1993)(fusing the doctrines of equitable tolling and estoppel.).

[45] This reasonable time after the lapse of the equitable period allows for the necessary closure of these refund claims. See, *Cada*, 920 F.2d at 453 (Posner, J.)(discussing the pros and cons between a rule of automatic extension and a rule of reasonable time for closure of a claim.).

[46] In *Cada*, the 7th Circuit held that "a plaintiff who invokes equitable tolling to suspend the statute of limitations must bring suit within a reasonable time after he has obtained, or by due diligence could have obtained, the necessary information." *Cada*, 920 F.2d at 453. Under §6511(a), a taxpayer is judge by the taxpayer's capability to act by filing or paying, not to discover. However, this is an immaterial distinction.

have subject matter jurisdiction under 28 USC 1346(a) to hear this timely claim for refund.[47] In addition, for such a taxpayer, there is no reason to believe that this taxpayer could defeat the present significance of §6511(b)(2)(A) by maintain the level of intent necessary to intentionally revive a stale refund claim by intentionally making a second overpayment.[48]

Thus, in situations of equitable tolling where the grounds of equitable tolling are present, Congress's intention behind §6511(b)(2)(A) is still met both because the claim would be timely, not stale, and because the same inability to file a refund claim during the equitable period would prevent the taxpayer from alternatively scheming to intentionally revive "a stale refund claim."

Thus, §6511(b)(2)(A) will still serve its present purpose if this Court finds that the doctrine of equitable tolling applies to §6511(a) and taxpayers meet the grounds for equitable tolling in subsequent cases. Because the legislative intent behind §6511(b)(2)(A) is still maintained even if the grounds for equitable tolling stop the 3-year period of §6511(a), Congress could not have intended to exclude the

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[47] *Lundy*, 1996 U.S. LEXIS at *11. (Timely filing of a refund claim is a jurisdictional prerequisite to bringing suit in a United States Court of Federal Claims or United States District Court.).

[48] *Scott II*, 847 F.Supp. at 1506(stating that a mentally incompetent taxpayer "will not necessarily be able to evaluate a tax return to determine whether a right to an overpayment exists."). Even if such a mentally incompetent taxpayer somehow managed to submit a claim for refund prior to the tolling period, it remains open as to the legal ramifications for such a taxpayer who signs that refund claim under the penalty of perjury.

time limits of §6511(a) from the doctrine of equitable tolling by limiting the AMOUNT of credit or refund under §6511(b)(2). Given the limited and specific purpose of §6511(b)(2)'s time barrier, it is more likely that Congress intended to allow for other reasons, such as equitable tolling, to toll refund claim time limits.

d. Conclusion that the Doctrine of Equitable Tolling Applies to the Tax Refund Statute §6511(a)

Because Congress did not intend to exclude the equitable tolling doctrine from §6511 and equitably tolling the time limits of §6511 will not conflict with §6511's purpose or intent, *Brockamp's* conclusion, that the statute of limitations provided in §6511 may be equitably tolled, should be affirmed by this Court.

II. PROJECTED LEGAL AND FISCAL IMPACT OF AFFIRMING *BROCKAMP*

a. Impact on the Judiciary

A finding by this Court that §6511(a) is subject to the doctrine of equitable tolling should not be viewed lightly. Equitably tolling the limitation periods for filing refund claims could ultimately affect, among other variegated Code timeliness provisions, §6511(a)(credit/refund limitations); §6511(b)(1)-(b)(2) (allowance of credit/refund limitations); §6511(c)(1) (extensions of time by agreement); §6511(d)(1) (bad debts and worthless securities); §6511(d)(2) (net operating loss and capital loss carrybacks); §6511(d)(3) (foreign tax credit); §6511(d)(4) (business credit carryback); §6511(d)(5) (self-employment tax); §6511(d)(6) (income recaptured under qualified plan termination (ERISA)); §6511(g) (partnership items of partnerships covered by

unified proceeding rules); §2011(c) (state death tax credits); §2014(e) (foreign death tax credits); §2015 (death tax on reversionary interests or remainders in property credits); §6013(b)(2)(B) (joint returns after filing separately); or §6696(d)(2) (preparer penalties).

Other Code statutory deadlines that may be affected by equitable tolling include §6213 (Tax Court petition after issue of deficiency notice); §6226 (Tax Court, Court of Federal Claims, or district court petition after notice of final partnership administrative adjustment (FPAA)); §6228 (petition to Tax Court, Court of Federal Claims, or district court after denial of a tax matters partner's admin. request); §6703 (district court determination of promoter & frivolous return penalties); §7426 (wrongful levy third-party suits); or §7429 (judicial review of jeopardy assessments).

Such a holding may also impact the three tax judicial doctrines relating to periods of limitations (recoupment[49], setoff, and estoppel) and the tax mitigation provisions of IRC §§1311-1314.

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[49] For example, if the plaintiff in *Dalm* successfully argued to equitably toll the time limits for the recoupment's time barred main action (instead of unsuccessfully arguing that equitable recoupment can be the sole basis for jurisdiction of the time barred ancillary action), a refund claim filed within the equitable tolling period would be timely, and thus jurisdictional for the main action. And, in a daisy chain fashion, recoupment from the now timely main action would create jurisdiction for the ancillary claim. Equitable tolling could also directly toll the time limits of the ancillary action as well, if the equitable period existed for that amount of time.

b. Impact on the Public Fisc

Outside of the judiciary's own budget, the fiscal impact of a finding by this Court that §6511(a) is subject to the doctrine of equitable tolling will be limited due to the narrow grounds of equitable tolling, *Irwin*, 498 U.S. at 457, and the fact that the loss of such revenue is unbudgeted, *Webb*, 66 F.3d at 703 (dissent).

CONCLUSION

For the foregoing reasons, *amicus* respectfully asks the Court to grant a writ of certiorari in order to find that the statutory time limits of §6511(a) are subject to the doctrine of equitable tolling.

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OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

MARIAN BROCKAMP, ADMINISTRATOR OF THE ESTATE OF STANLEY B. MCGILL

UNITED STATES OF AMERICA, PETITIONER

v.

NICHOLAS T. SCOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the doctrine of equitable tolling may be applied to enlarge or suspend the statutory periods that limit (i) the time in which a claim for refund of taxes may be filed (26 U.S.C. 6511(a)) and (ii) the amount of recovery on a claim (26 U.S.C. 6511(b)(2)).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	4
Summary of argument	11
Argument:	
The doctrine of equitable tolling may not be applied to enlarge or suspend the statutory periods that limit the time for filing, and the amount of recovery on, tax refund claims	15
A. The doctrine of equitable tolling does not apply to tax refund claims	15
1. The evolution of the refund claim requirement.	15
2. The current statutory framework.	18
3. The requirements of Sections 6511(a) and (b) are not subject to equitable tolling.	21
B. *Irwin* v. *Department of Veterans Affairs* does not support a different conclusion	27
1. The rebuttable presumption of equitable tolling is inapplicable to tax refund claims	28
2. The rebuttable presumption of equitable-tolling described in *Irwin* is premised upon equal treatment of private and government remedies	39
3. No refund may be allowed even if the limitation on filing claims were tolled	40
Conclusion	41

TABLE OF AUTHORITIES

Cases: Page

American Pipe & Construction Co. v. *Utah*, 414 U.S. 538 (1974) 34

Amoco v. *Newton Sheep Co.*, 85 F.3d 1464 (10th Cir. 1996) 21, 28, 35, 38, 41

Bend v. *Hoyt*, 38 U.S. (13 Pet.) 263 (1839) 16

Bowen v. *City of New York*, 476 U.S. 467 (1986) 31, 34

Burnett v. *New York Central R.R.*, 380 U.S. 424 (1965) 34

Central Bank v. *First Interstate Bank*, 114 S. Ct. 1439 (1994) 35-36

Central States Pension Fund v. *Navco*, 3 F.3d 167 (7th Cir. 1993), cert. denied, 114 S. Ct. 1062 (1994) 36

City of Philadelphia v. *The Collector*, 72 U.S. (5 Wall.) 720 (1867) 16

Elliott v. *Swartwout*, 35 U.S. (10 Pet.) 137 (1836) .. 16

First Alabama Bank, N.A. v. *United States*, 981 F.2d 1226 (11th Cir. 1993) 28

First United Methodist Church v. *United States Gypsum Co.*, 882 F.2d 862 (4th Cir. 1989), cert. denied, 493 U.S. 1070 (1990) 34-35, 38

Flora v. *United States*, 362 U.S. 145 (1960) ... 16, 17, 18

Girouard v. *United States*, 328 U.S. 61 (1946) 35

Glarner v. *United States*, 30 F.3d 697 (6th Cir. 1994) 39

Goad v. *Celotex Corp.*, 831 F.2d 508 (4th Cir. 1987), cert. denied, 487 U.S. 1218 (1988) 35

Guaranty Trust Co. v. *United States*, 304 U.S. 126 (1938) 22

Hallstrom v. *Tillamook County*, 493 U.S. 20 (1989) 34

Honda v. *Clark*, 386 U.S. 484 (1967) 34

Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) 7, 13, 27, 28, 29, 31, 32, 34

Jones v. *Liberty Glass Co.*, 332 U.S. 524 (1947) 19

Cases—Continued: Page

Justice v. *United States*, 6 F.3d 1474 (11th Cir. 1993) 39

Kendall v. *United States*, 107 U.S. 123 (1883) 29

Kingston Products Corp. v. *United States*, 368 F.2d 281 (Ct. Cl. 1966) 21

Kreiger v. *United States*, 539 F.2d 317 (3d Cir. 1976) 21

Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350 (1991) 14, 35, 36

Larson v. *Northrop Corp.*, 21 F.3d 1164 (D.C. Cir. 1994) 36

Miller v. *United States*, 949 F.2d 708 (4th Cir. 1991) 20

Nunnally v. *MacCausland*, 996 F.2d 1 (1st Cir. 1993) 39

Oropallo v. *United States*, 994 F.2d 25 (1st Cir. 1993), cert. denied, 114 S. Ct. 705 (1994) 8, 21, 28, 35, 36

Overhauser v. *United States*, 45 F.3d 1085 (7th Cir. 1995) 20

Republic Petroleum Corp. v. *United States*, 613 F.2d 518 (5th Cir. 1980) 21

Rosser v. *United States*, 9 F.3d 1519 (11th Cir. 1993) 28

Rothensies v. *Electric Battery Co.*, 329 U.S. 296 (1946) 22, 23, 26

Smith v. *Secretary of the Department of Health and Human Services*, 26 Cl. Ct. 116, aff'd, 983 F.2d 1088 (Fed. Cir. 1992) 36

Soriano v. *United States*, 352 U.S. 270 (1957) 30

United States v. *Dalm*, 494 U.S. 596 (1990) 8, 12, 13, 23, 25, 38

United States v. *Garbutt Oil Co.*, 302 U.S. 528 (1938) 20

United States v. *Kubrick*, 444 U.S. 111 (1979) ... 22, 31

United States v. *Mottaz*, 476 U.S. 834 (1986) 22

Cases—Continued: Page

Vintilla v. *United States*, 931 F.2d 1444 (11th Cir. 1991) 9, 28
Webb v. *United States*:
66 F.3d 691 (4th Cir. 1995), petition for cert. pending, No. 95-1360 ..... 21, 27, 28, 34, 37, 38, 39, 40
850 F. Supp. 489 (E.D. Va. 1994), aff'd, 66 F.3d 691 (4th Cir. 1995), petition for cert. pending, No. 95-1360 ..... 9, 28
Young v. *United States*, 203 F.2d 686 (8th Cir. 1953) 9
Zipes v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982) 22
Constitution and statutes:
U.S. Const. Art. I, § 9, Cl. 7 28
Act of Feb. 26, 1845, ch. 22, 5 Stat. 727 ..... 15, 31
Act of July 13, 1866, ch. 184, § 19, 14 Stat. 152 16
Act of June 6, 1872, ch. 315, § 44, 17 Stat. 258 17
Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (Tucker Act) 18
Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087:
§ 24, pt. 20, 36 Stat. 1093 18
§ 155, 36 Stat. 1139 29
Act of Aug. 16, 1954, ch. 736, § 6511, 68A Stat. 808 29
Act of Sept. 16, 1959, Pub. L. No. 86-280, 73 Stat. 563 19
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 27
Internal Revenue Code (26 U.S.C.):
§§ 1311-1314 ..... 13, 28
§ 1311(a) 12, 13, 24
§ 6511 24
§ 6511(a) ..... *passim*
§ 6511(b) ..... *passim*
§ 6511(b)(1) ..... *passim*
§ 6511(b)(2) 3, 12, 13, 14, 20, 21, 32, 33
§ 6511(b)(2)(A) 3, 20
§ 6511(b)(2)(A)-(C) 3, 33, 41
§ 6511(b)(2)(B) 12, 14, 20, 33
§ 6511(b)(2)(C) 3, 33, 41
§ 6511(d) 3
§ 6511(d)(1) 13, 23
§ 6511(d)(2) 23
§ 6514(a) 23
§ 6514(a)(1) 13, 32
§ 7422(a) 12, 20
§ 7422(b) 4, 6, 11, 17, 18, 19, 22
§ 7422(f)(1) 17
Multiemployer Pension Plan Amendments of 1980, 29 U.S.C. 1451(f) 18
National Childhood Vaccine Injury Act of 1986, 42 U.S.C. 300aa-1 to 1-300aa-33 36
Revenue Act of 1918, ch. 18, § 250(e), 40 Stat. 1083-1084 36
Revenue Act of 1921, ch. 136, § 250(e), 42 Stat. 266 ... 24
Revenue Act of 1924, ch. 234, § 281(b), 43 Stat. 301 24
Revenue Act of 1932, ch. 209, 47 Stat. 169:
§ 322(b), 47 Stat. 242 ..... 19, 20
§ 810, 47 Stat. 283 19
Revenue Act of 1942, ch. 619, § 507, 56 Stat. 961 19
Rev. Stat. § 3226 (1875 ed.) 26
15 U.S.C. 78i(e) 17, 18
28 U.S.C. 1346(a)(1) 35
28 U.S.C. 2401 18
28 U.S.C. 2401 (Reviser's Notes) 30
28 U.S.C. 2401(a) 30
28 U.S.C. 2501 30
28 U.S.C. 2501 (Reviser's Notes) 30

Statutes—Continued: Page

Miscellaneous:
BNA Daily Tax Report G-8 (Mar. 21, 1996) 30
H.R. Conf. Rep. No. 356, 69th Cong., 1st Sess. (1926) 27
H.R. Rep. No. 2330, 75th Cong., 3d Sess. (1938) 24
H.R. Rep. No. 2333, 77th Cong., 2d Sess. (1942) 25
H.R. Rep. No. 849, 75th Cong., 1st Sess. (1945) 23
24

Miscellaneous—Continued: Page

H.R. Rep. No. 308, 80th Cong., 1st Sess. (1947) 30
Internal Revenue Service, Compliance Research, Document 6186, *Calendar Year Return Projections for the United States and Service Centers: 1995--2002* (Oct. 1995) 25
John M. Maguire et al., *Section 820 of the Revenue Act of 1938*, 48 Yale L. J. 509 (1939) 25
S. Rep. No. 398, 68th Cong., 1st Sess. (1924) 21
S. Rep. No. 665, 72nd Cong., 1st Sess. (1932) 19
S. Rep. No. 1567, 75th Cong., 3d Sess. (1938) 25
S. Rep. No. 663, 89th Cong., 1st Sess. (1965) 27

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1225

UNITED STATES OF AMERICA, PETITIONER

v.

MARIAN BROCKAMP, ADMINISTRATOR OF THE ESTATE OF STANLEY B. MCGILL

UNITED STATES OF AMERICA, PETITIONER

v.

NICHOLAS T. SCOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

1. The opinion of the court of appeals in *United States* v. *Brockamp* (Pet. App. 1a-16a) is reported at 67 F.3d 260. The opinion of the district court (Pet. App. 17a-30a) is reported at 859 F. Supp. 1283.

2. The opinion of the court of appeals in *United States* v. *Scott* (Pet. App. 31a-34a) is unpublished, but the decision is noted at 70 F.3d 120 (Table). The opinions of the district court (Pet. App. 35a-59a, 60a-

76a) are reported at 847 F. Supp. 1499 and 795 F. Supp. 1028.

JURISDICTION

The judgments of the court of appeals in *United States* v. *Brockamp* and *United States* v. *Scott* were entered on October 5, 1995. On December 27, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 2, 1996. The petition was filed on January 31, 1996, and was granted on June 3, 1996. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 6511 of the Internal Revenue Code, 26 U.S.C. 6511, provides in relevant part:

(a) Period of limitation on filing claim

Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

(b) Limitation on allowance of credits and refunds

(1) Filing of claim within prescribed period

No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

(2) Limit on amount of credit or refund

(A) Limit where claim filed within 3-year period

If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. If the tax was required to be paid by means of a stamp, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim.

(B) Limit where claim not filed within 3-year period

If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

(C) Limit if no claim filed

If no claim was filed, the credit or refund shall not exceed the amount which would be allowable under subparagraph (A) or (B), as the case may be, if claim was filed on the date the credit or refund is allowed.

2. Section 7422(a) of the Internal Revenue Code, 26 U.S.C. 7422(a), provides:

(a) No suit prior to filing claim for refund

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

STATEMENT

A. *United States* v. *Brockamp*

1. Respondent Marian Brockamp is the administrator and sole beneficiary of the estate of her father, Stanley McGill. On April 15, 1984, Mr. McGill transmitted $7000 to the Internal Revenue Service in payment of income taxes for 1983. Accompanying the check was an application for an extension of time in which to file his return for that year. Mr. McGill did not, however, thereafter file either a return or a claim for refund for the 1983 tax year. In 1984, Mr. McGill

was 93 years old. According to respondent, he was "senile" and "mentally deranged" at that time (Pet. App. 18a-19a).

Mr. McGill died in 1988. After respondent was appointed administrator of his estate, she wrote the IRS to request a refund of the taxes that he paid for 1983. She stated that her father "had mistakenly sent a check for $7000 instead of $700" to the IRS (Pet. App. 19a).[1] Respondent thereafter submitted an income tax return for Mr. McGill for the 1983 tax year which indicated that his liability for taxes for that year was $427 (*id.* at 19a, 24a).

The IRS denied the requested refund. The Service noted that the taxes were paid "more than three years prior to her claim" (Pet. App. 19a) and that the requested refund was therefore barred by Section 6511 of the Internal Revenue Code, 26 U.S.C. 6511.

2. Mrs. Brockamp thereafter commenced this tax refund action in federal district court on behalf of the estate. She contended (i) that the doctrine of equitable tolling applies to the limitation periods for income tax refund claims under Section 6511 and (ii) that the claimed mental incompetency of Mr. McGill is a sufficient basis for applying equitable tolling.[2]

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[1] The contention that Mr. McGill was senile was supported only by Mrs. Brockamp's affidavit, which was submitted in support of her motion for summary judgment. The court of appeals concluded that equitable tolling was applicable to tax refund suits and remanded the case for the district court to determine whether Mr. McGill was competent when he paid his taxes in 1984 (Pet. App. 8a).

[2] Respondent also contended that the $7000 payment made by Mr. McGill was only a "deposit"—and not a payment of taxes—and was therefore not subject to the limitation periods of Section 6511 (Pet. App. 22a). The district court rejected

The district court concluded that the doctrine of equitable tolling does not apply to the statutory limitations on tax refund claims set forth in Section 6511 of the Code. The court first noted (Pet. App. 20a) that Section 7422(a) of the Code specifies that courts may not exercise jurisdiction over a tax refund suit unless "a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard" (26 U.S.C. 7422(a)). The court observed that the applicable "provisions of law" are contained in Section 6511(a), which provides that a claim for refund must be filed (26 U.S.C. 6511(a))

> within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

Because the refund claim submitted by respondent fell outside these statutory periods, the district court concluded that it lacked jurisdiction over the suit under Section 7422(a) (Pet. App. 21a, 29a-30a).

The court further noted that, "[i]n addition to the time limitations of Section 6511(a), Section 6511(b) limits the *amount* of a refund recoverable by a claimant" (Pet. App. 21a-22a (emphasis added)):

> Specifically, if a person files a timely claim within the three-year period mentioned in

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that contention, noting that "[t]here is no evidence that the check was intended as a deposit" (*id.* at 23a). The court of appeals reversed the district court on other grounds and therefore did not address respondent's contention that the payment was a "deposit." See *id.* at 8a n.1 (Fernandez, J., dissenting).

> Section 6511(a), the amount of a refund is limited to the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return.

26 U.S.C. §6511(b)(2)(A). If, however, a claim was not timely filed within the three-year period mentioned in Section 6511(a), the amount of

> refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

26 U.S.C. §6511(b)(2)(B). * * *

The court explained that the provisions of Section 6511(b) that establish substantive limitations on the *amount* of any refund—even on a timely filed claim—are not subject to the doctrine of equitable tolling (Pet. App. 21a-22a, 27a-28a).

The district court noted that in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court "recognized that the courts have traditionally declined to apply equitable principles in cases against the government because waivers of sovereign immunity are to be strictly construed" (Pet. App. 25a, citing 498 U.S. at 96-99). In *Irwin*, however, the Court "changed its approach to the issue of equitable tolling against the government" and held that (Pet. App. 25a, quoting 498 U.S. at 95-96)

> the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.

Several lower courts thereafter relied on *Irwin* to "extend[] the doctrine of equitable tolling to tax refund cases" (*id.* at 25a-27a, citing cases). The district court concluded, however, that those decisions were not correct. The court noted that in *Oropallo* v. *United States*, 994 F.2d 25 (1993), cert. denied, 114 S. Ct. 705 (1994), the First Circuit (in a per curiam opinion joined by then-Judge Breyer) concluded that the "rebuttable presumption" that equitable tolling applies to suits against the government is inapplicable to tax refund suits because the "limitations imposed by Sections 6511(a) and (b) are fundamentally inconsistent with the doctrine of equitable tolling" (Pet. App. 27a, citing 994 F.2d at 30-31). The district court also noted that in *United States* v. *Dalm*, 494 U.S. 596 (1990), this Court held that an equitable claim for recovery of a tax overpayment was not exempt from the limitation periods of Section 6511 (Pet. App. 28a-29a, citing 494 U.S. at 610).

Applying the reasoning of *Oropallo* and *Dalm*, the district court held that the periods of limitations on refund claims and refund recoveries under Sections 6511(a) and (b) are not subject to the doctrine of equitable tolling. Because the refund claim in this case was filed outside those periods of limitations, the court entered judgment for the government (Pet. App. 30a).

3. The court of appeals reversed (Pet. App. 1a-8a), with Judge Fernandez dissenting (*id.* at 8a-16a). The majority opinion stated that this Court's decision in *Irwin* "effectively limited the *Dalm* decision" and "requires that, in the absence of congressional action, statutes of limitations are, as a general rule, presumed to be subject to equitable tolling in suits against the United States" (*id.* at 5a). The court

found nothing in the text or history of Section 6511 to indicate "any intention [by Congress] that equitable tolling should not apply to § 6511" (*ibid.*). The court therefore concluded that "the statute of limitations provided in § 6511 may be equitably tolled" (*ibid.*).

The court noted that, in contexts not involving tax refund claims, "several post-*Irwin* courts have held that mental incompetence will toll statutes of limitation in suits against the government" (Pet. App. 7a, citing cases). The court stated that it agreed with those decisions because (*id.* at 8a)

> [p]rinciples of equity mandate that when mental incompetence precludes a person from asserting his rights during the proper time period, he should not be precluded from later seeking redress for his injuries.

Because a "triable issue of fact [exists] as to Mr. McGill's mental incompetence," the court of appeals reversed the decision of the district court and remanded for further proceedings (*ibid.*). See note 1, *supra*.

Judge Fernandez dissented from the decision of the court of appeals because "the principles of equitable tolling cannot be applied to § 6511" (Pet. App. 9a, 10a):[3]

> [A]lthough *Irwin* creates a rebuttable presumption of equitable tolling in most areas, *Dalm*

[3] Judge Fernandez noted that several other courts have held that equitable tolling cannot apply to Section 6511. See Pet. App. 10a-11a, citing *Vintilla* v. *United States*, 931 F.2d 1444, 1446-1447 (11th Cir. 1991); *Webb* v. *United States*, 850 F. Supp. 489, 491-493 (E.D. Va. 1994), aff'd, 66 F.3d 691 (4th Cir. 1995), petition for cert. pending, No. 95-1360. The majority opinion in *Brockamp* did not address those conflicting decisions.

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effectively rebuts that presumption because in it the Supreme Court determined that principles of equity would not be applied to toll § 6511.

Judge Fernandez further noted that (*id.* at 13a),

> [a]s *Oropallo*, 994 F.2d at 27, pointed out, in addition to the limitations periods imposed by § 6511(a), subsection (b) of § 6511 places limits on the amount of any refund a claimant may receive. Under § 6511(b)'s provisions, [respondent] would not be able to collect any refund even if her suit were allowed to go forward under subsection (a) because the gap between the time that her father made the payments to the IRS and the time that she filed the refund claim is too great.

Judge Fernandez concluded that Section 6511(b) operates as a period of repose, imposing an outside limit on recovery so that "the government may finally have closure as to particular tax returns" (Pet. App. 14a).

B. *United States* v. *Scott*

1. In 1984, respondent Nicholas Scott made estimated tax payments of $30,096 for his 1984 tax liability.[4] In 1989, respondent filed a belated tax return for 1984 claiming that he had no tax liability for 1984 and requesting a refund of the amounts he had previously paid. The Internal Revenue Service denied the requested refund because it was untimely under Section 6511 of the Code (Pet. App. 32a).

[4] Mr. Scott is an attorney. By 1984, he had ceased practicing law and was actively involved in the operation of a retail wine store (Pet. App. 36a, 38a-41a, 44a-45a).

Respondent then commenced this tax refund suit in federal district court. He conceded that the statute of limitations for his refund claim had expired, but he contended that his claim should be allowed because, from the time his 1984 tax return was due until the time he filed that return in 1989, he was mentally incompetent from alcoholism (Pet. App. 37a, 61a). The district court concluded that the doctrine of equitable tolling applies in tax refund suits and that the limitations of Section 6511 should not be applied in this case because respondent "was an alcoholic whose alcoholism rendered him mentally incompetent and unable to file a tax return from January 1985 through November 1989" (Pet. App. 33a).[5] The court therefore entered judgment for respondent.

2. The court of appeals affirmed, relying wholly on the decision entered on the same day by the same panel in *United States* v. *Brockamp* (Pet. App. 33a, 34a). See pages 8-9, *supra*. Judge Fernandez again dissented, for the reasons set forth in his dissent in *Brockamp* (*id.* at 34a).

SUMMARY OF ARGUMENT

A. The doctrine of equitable tolling does not apply to income tax refund suits. No suit for the recovery of an internal revenue tax is permitted unless the taxpayer has "duly filed" an administrative claim for refund "according to the provisions of law" (26 U.S.C. 7422(a)). The applicable "provisions of law" are set forth in Section 6511 of the Code. With respect to a tax for which a return is required (such as an income

[5] The court reached these factual conclusions following a trial at which it received evidence pertaining to the effect of Mr. Scott's alcoholism on his business and personal affairs over the period from 1984 to November 1989 (Pet. App. 37a-42a).

tax), Section 6511(a) requires that an administrative refund claim be filed within three years of the time the return was filed or two years of the time the tax was paid, "whichever of such periods expires the later." 26 U.S.C. 6511(a).

Section 6511(b)(1) of the Code makes it clear that a claim not filed within these express statutory periods may not be allowed, for it states that "[n]o credit or refund shall be allowed or made after the expiration of th[is] period * * * unless a claim for credit or refund is filed by the taxpayer *within such period*." 26 U.S.C. 6511(b)(1) (emphasis added). Congress reemphasized that conclusion by further specifying that any refund or credit given on a claim that is filed after the expiration of the statutory periods of limitation is "erroneous" and to be "considered void" (26 U.S.C. 6514(a)(1)). Moreover, even when a refund claim *is* filed within the periods specified in Section 6511(a), Congress has limited "the amount of the credit or refund" to the "portion of the tax paid within" those statutory periods—and has thereby again precluded any recovery on untimely claims. See 26 U.S.C. 6511(b)(2)(A)-(C). Other than the singular decision of the court of appeals in the present case, the courts of appeals have uniformly concluded that these express, carefully articulated, interlocking statutory limits on tax refund claims may not be disregarded through application of a judge-made doctrine of "equitable tolling."

This Court noted in *United States* v. *Dalm*, 494 U.S. 596, 610 (1990), that "Congress has legislated a set of exceptions to the limitations period" for tax refund claims. For example, in the specific situations described in Sections 1311-1314 of the Code, Congress has "mitigated" the effect of the statute of limitations

for tax refund claims by permitting untimely claims to be made. 26 U.S.C. 1311-1314. See also 26 U.S.C. 6511(d). As the Court concluded in *Dalm*, an untimely suit for refund that "does not come within these provisions" may not proceed, for any other conclusion would impermissibly "overrid[e] Congress' judgment as to when equity requires that there be an exception to the limitations bar." 494 U.S. at 610.

B. This Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), neither compels nor supports a different conclusion. In *Irwin*, the Court held that a statutory 30-day period for commencing suit against the government under Title VII of the Civil Rights Act is subject to equitable tolling. The Court stated that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States" (*id.* at 95-96). The Court reasoned that a presumption of equitable tolling is, in general, "likely to be a realistic assessment of legislative intent" (*id.* at 95). But the Court emphasized that the presumption is rebuttable and that particular legislation "may provide otherwise" (*id.* at 96).

As four other courts of appeals have concluded, the Ninth Circuit erred in the present case in concluding that the "rebuttable presumption of equitable tolling" applies to the statutes governing tax refund claims. These detailed statutes do more than merely limit the time for commencing suit—they also expressly and unequivocally prohibit the payment of claims that have not been filed within the defined statutory periods (26 U.S.C. 6511(b)(1)) and further provide that any payment of such a claim would be "erroneous" and "void" as a matter of law (26 U.S.C. 6514(a)).

The provisions of Section 6511(b) of the Code do not represent a "statute of limitations" for the commencement of a suit or the filing of a claim. Instead, they impose *substantive* limitations on the amount of recovery that (i) preclude *any* payment on a claim filed outside the express statutory periods established in Section 6511(a) and (ii) limit the amount of any refund to the "portion of the tax paid within" those express statutory periods—and thereby prohibit any refund of taxes for which an untimely claim was made. 26 U.S.C. 6511(b)(1), (b)(2)(A)-(C). Because Section 6511(b) imposes *substantive*, rather than procedural, limitations on tax refund recoveries, the requirements of that statute are not subject to modification under the doctrine of equitable tolling.

These substantive limitations on tax refund claims confirm that Congress has insisted upon a definite and unyielding point of repose for such claims. Especially in light of the fact that approximately 200,000,000 tax returns are filed each year—any of which could potentially be the subject of an untimely refund claim—the only "realistic assessment of legislative intent" manifested by these statutes is that Congress did *not* intend the detailed limitations provisions that it has enacted to be disregarded on "equitable" grounds. In this case, as in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), the presumption of equitable tolling described in *Irwin* is inapplicable because the statutory scheme manifests a legislative policy of repose that cannot be reconciled with equitable tolling.

ARGUMENT

THE DOCTRINE OF EQUITABLE TOLLING MAY NOT BE APPLIED TO ENLARGE OR SUSPEND THE STATUTORY PERIODS THAT LIMIT THE TIME FOR FILING, AND THE AMOUNT OF RECOVERY ON, TAX REFUND CLAIMS

A. THE DOCTRINE OF EQUITABLE TOLLING DOES NOT APPLY TO TAX REFUND CLAIMS

1. *The Evolution of the Refund Claim Requirement.*

For the first one hundred years of our Nation's history, only two methods were available for obtaining a refund of taxes that had been improperly or unlawfully collected. First, a taxpayer could apply to Congress for a private bill authorizing an appropriation to pay monies from the Treasury to refund the taxes. Such private bills were necessary because, in the absence of any general legislation authorizing such recoveries, suits seeking money judgments directly against the sovereign were not permitted both as a matter of constitutional tradition and constitutional text. See U.S. Const. Art. I, § 9, Cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."). The only judicial remedy available to a taxpayer prior to 1887 was a suit directly against the Collector who had exacted and received the allegedly erroneous payment of taxes. The theory of such an action was that the

suit was against the Collector in his personal capacity and was not against the sovereign.[6]

From the beginning of this history, the United States has insisted upon a prompt claim for refund as a condition of refunding taxes that have been improperly collected. In the judicial action against the Collector, it was a prerequisite to any relief that the taxpayer make a protest and demand for refund *at the time the taxes were paid*. The rationale for this requirement was that, if the Collector had paid the taxes over to the Treasury before receiving notice of the taxpayer's protest, (i) the Collector was then exonerated from personal liability and (ii) the monies could not be obtained directly from the Treasury because no statute had then authorized suit against the United States. *Elliott* v. *Swartwout*, 35 U.S. (10 Pet.) 137, 158 (1836). See also *Bend* v. *Hoyt*, 38 U.S. (13 Pet.) 263, 267 (1839).[7]

In 1875, Congress supplanted the requirement that a "protest" be made to the Collector at the time of

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[6] The history of the origins of the tax refund suit is described in substantial detail in the majority and dissenting opinions in *Flora* v. *United States*, 362 U.S. 145 (1960).

[7] The first statute that Congress enacted to afford taxpayers a right to sue Collectors for refunds codified the "protest" requirement by specifying that no action for the recovery of customs duties could "be maintained against any collector * * * unless the said protest was made in writing, and signed by the claimant, *at or before the payment* of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." Act of Feb. 26, 1845, ch. 22, 5 Stat. 727 (emphasis added). This requirement of prompt protest, which originated in customs cases, was also applied in all other suits seeking recovery of federal taxes. See *City of Philadelphia* v. *The Collector*, 72 U.S. (5 Wall.) 720, 730-733 (1867).

payment with a new requirement that an administrative refund claim be filed with the Secretary as a precondition of any suit for the recovery of an internal revenue tax. Section 3226 of the Revised Statutes of 1875,[8] which exists in substantially unmodified form as Sections 7422(a) and (b) of the Internal Revenue Code (see *Flora* v. *United States*, 362 U.S. at 152 n.11, 155-156 n.16), removed the requirement of a "protest" (26 U.S.C. 7422(b)) and specified instead (in its modern text) that (26 U.S.C. 7422(a)):

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected * * * until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

In imposing this new requirement of an administrative "claim for refund," Congress maintained the insistent, historical rule that the refund claim must be made promptly. The applicable statute then specified that "all suits and proceedings for the recovery of any internal tax * * * shall be brought within two years next after the cause of action accrued *and not after*; and all claims for the refunding of any internal tax or penalty shall be presented to the commissioner of internal revenue within two years next after the cause of action accrued *and not*

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[8] This statute was derived from Section 19 of the Act of July 13, 1866, ch. 184, 14 Stat. 152.

after" (Act of June 6, 1872, ch. 315, § 44, 17 Stat. 257-258 (emphasis added)).

It was under this inflexible statutory framework that Congress, in the Tucker Act, first provided a limited jurisdiction for federal courts to adjudicate tax refund claims in suits brought directly against the United States. See Act of Mar. 3, 1887, ch. 359, 24 Stat. 505. A more general jurisdiction to adjudicate such claims was established in 1921. 28 U.S.C. 1346(a)(1).[9] Having provided this direct remedy against the United States, Congress determined that suits against the Collector for the recovery of taxes were no longer to be permitted. 26 U.S.C. 7422(f)(1).

2. *The Current Statutory Framework.*

After the federal income tax was enacted at the beginning of this Century, Congress found it necessary to refine its tax refund provisions to meet more particularly the annual reporting cycles of that tax. A series of legislative enactments has culminated in what is now Section 6511 of the Code. That Section establishes an intricate and comprehensive structure for the disposition of all tax refund claims—a structure that combines the requirement of a prompt pre-

[9] Prior to 1921, the jurisdiction of the federal district courts in suits against the United States was limited to refund claims seeking a recovery of less than $1000. In 1921, Congress authorized suits for tax refunds in federal district courts without regard to the amount in controversy. See 28 U.S.C. 1346(a)(1). The language of this jurisdictional provision is drawn directly from Section 3226 of the Revised Statutes (which is now codified, with slight modifications, as Section 7422(a) of the modern Code). Compare 28 U.S.C. 1346(a)(1) with 26 U.S.C. 7422(a). See *Flora* v. *United States*, 362 U.S. at 188-190 (Whittaker, J., dissenting).

sentation of the claim with several substantive limits on recovery. 26 U.S.C. 6511(a), 6511(b).[10]

No suit for the recovery of an internal revenue tax is permitted unless the taxpayer has "duly filed" an administrative claim for refund "according to the provisions of law" (26 U.S.C. 7422(a)). The applicable "provisions of law" are those set forth in Section 6511(a) of the Code. With respect to a tax for which a return is required (such as an income tax), Section 6511(a) requires that an administrative refund claim be filed within three years of the time the return was filed or two years of the time the tax was paid,

[10] Sections 6511(a) and 6511(b) were enacted in essentially their current form as part of the Internal Revenue Code of 1954 (Aug. 16, 1954, ch. 736, 68A Stat. 808). The precursor of these provisions was Section 281(b) of the Revenue Act of 1924, ch. 234, 43 Stat. 301, in which Congress (i) provided a finite period during which a claim for refund of income, war and excess profits taxes could be made and (ii) then further specified that "[t]he amount" of any refund of such taxes shall not "exceed the portion of the tax paid during the" period expressly permitted for the refund claim to be filed. Similarly, Section 322(b) of the Revenue Act of 1932, ch. 209, 47 Stat. 242, provided a two-year period of limitation for the filing of claims for refund of income taxes—calculated from the time of payment—and also limited the amount of any such refund to the amount of tax paid within the two years prior to the filing of the claim. See *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 527, 530 (1947). Section 810 of the Revenue Act of 1932, ch. 209, 47 Stat. 283, provided a similar structure for estate tax refunds in order "to remove all question as to the precise effect of a period of limitation on refunds which runs from the payment of the tax." S. Rep. No. 665, 72nd Cong., 1st Sess. 53 (1932). Section 6511 brought these various provisions into a single statute that governs the payment of refund claims for "any tax imposed" under the Internal Revenue Code. 26 U.S.C. 6511(a).

"whichever of such periods expires the later." 26 U.S.C. 6511(a).

Congress did not leave any doubt as to the consequences that are to attend any failure to comply with this statutory filing requirement. Section 6511(b) clearly provides that a claim that is not filed within the express statutory periods of Section 6511(a) may not be allowed, for it specifies that "[n]o credit or refund shall be allowed or made after the expiration of th[is] period * * * unless a claim for credit or refund is filed by the taxpayer *within such period*." 26 U.S.C. 6511(b)(1) (emphasis added).[11] Congress reemphasized that substantive restriction by further specifying that any credit or refund given on a claim that is filed *after* the expiration of the express statutory periods of limitation is "erroneous" and is to be "considered void" (26 U.S.C. 6514(a)(1)). Moreover, even when a refund claim *is* filed within the periods specified in Section 6511(a), Congress has limited "the amount of the credit or refund" to the "portion of the tax paid within" those statutory periods—and has thereby again precluded any recovery on untimely claims. 26 U.S.C. 6511(b)(2)(A)-(C).[12] See also pages 32-33, *infra*.

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[11] Government officers have no power to waive this substantive limitation on recovery on untimely tax refund claims. *United States* v. *Garbutt Oil Co.*, 302 U.S. 528, 533-535 (1938). See also *Overhauser* v. *United States*, 45 F.3d 1085, 1088 (7th Cir. 1995); *Miller* v. *United States*, 949 F.2d 708, 712 (4th Cir. 1991).

[12] Section 6511(b)(2) is designed for the precise purpose of cutting off stale claims. The history of its original precursor (Section 281(b) of the Revenue Act of 1924, ch. 234, 43 Stat. 301) reflects that the statute ensures "that a late payment of a small portion of the tax due may not extend the time for filing a claim for refund of the entire tax" (S. Rep. No. 398, 68th Cong., 1st Sess. 33 (1924)). To accomplish that result, "a limitation has been inserted by the committee restricting the amount of a credit or refund to the portion of the tax paid during the four years [now two years] immediately preceding the filing of the claim." *Ibid.*

3. The Requirements of Sections 6511(a) and (b) Are Not Subject to Equitable Tolling.

a. Other than the decision in the present case, the courts of appeals have consistently concluded that these express, carefully articulated, interlocking statutory limits on tax refund claims may not be disregarded through application of a judge-made doctrine of equitable tolling. See, *e.g.*, *Amoco* v. *Newton Sheep Co.*, 85 F.3d 1464 (10th Cir. 1996); *Webb* v. *United States*, 66 F.3d 691, 700 (4th Cir. 1995), petition for cert. pending, No. 95-1360; *Oropallo* v. *United States*, 994 F.2d 25, 30-31 (1st Cir. 1993). Congress has expressly provided that a refund is not to be "allowed or made" on a claim that is filed "after the expiration" of the periods specified in Section 6511(a). 26 U.S.C. 6511(b)(1). Courts have long held that application of equitable tolling in disregard of these express limitations on tax refund suits would "run[] afoul of the well-established principle that statutes of limitation applicable to suits against the government are conditions attached to the sovereign's consent to be sued and must be strictly construed." *Kreiger* v. *United States*, 539 F.2d 317, 320 (3d Cir. 1976). See also *Republic Petroleum Corp.* v. *United States*, 613 F.2d 518, 527 (5th Cir. 1980); *Kingston Products Corp.* v. *United States*, 368 F.2d 281, 288 (Ct. Cl. 1966);

Young v. *United States*, 203 F.2d 686, 689 (8th Cir. 1953).[13]

In *United States* v. *Kubrick*, 444 U.S. 111 (1979), this Court emphasized that a statute of limitations is a "meritorious defense, in itself serving a public interest." *Id.* at 117, quoting *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136 (1938). The Court explained that "[s]tatutes of limitations, which 'are found and approved in all systems of enlightened jurisprudence,' represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" 304 U.S. at 136 (internal citations omitted). See also *United States* v. *Mottaz*, 476 U.S. 834, 851 (1986).

The Court has emphasized that a uniform statute of limitations is of critical importance in the particular context of tax refund claims (*Rothensies* v. *Electric Battery Co.*, 329 U.S. 296, 302 (1946) (footnote omitted):

> As statutes of limitation are applied in the field of taxation, the taxpayer sometimes gets advantages and at other times the Government gets them. Both hardships to the taxpayers and losses to the revenues may be pointed out. They tempt

[13] Compliance with the prompt filing requirement is a condition of the government's waiver of its sovereign immunity and is a jurisdictional prerequisite to a refund suit in district court. See 26 U.S.C. 7422(a) ("[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected * * * until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard").

> the equity-minded judge to seek for ways of relief in individual cases.

Rejecting the suggestion that equitable grounds may support a decision not to enforce the statute of limitations on tax refund claims, the Court concluded that, "[i]f there are to be exceptions to the statute of limitations, it is for Congress rather than for the courts to create and limit them." *Id.* at 303.

Indeed, as this Court noted in *United States* v. *Dalm*, 494 U.S. at 610, Congress *has* "legislated a set of exceptions to the limitations period" for tax refund claims. In Section 6511(d), Congress expanded the limitations period for claiming refunds based upon several specific types of deductions and credits. A seven-year period of limitations for bad debts and worthless securities was provided in Section 6511(d)(1) to address inequities arising from uncertainty about the worthlessness of a debt (H.R. Rep. No. 2333, 77th Cong., 2d Sess. 44-45 (1942)):

> Under the existing law, the taxpayer may be whipsawed out of a deduction for a bad debt because of the uncertainty as to the time at which the debt becomes worthless. Later evidence often discloses that present decisions as to the year in which a debt becomes worthless are erroneous. * * *
>
> To relieve this inequitable situation, the bill replaces the present 3-year statute of limitations in such cases with a 7-year statute, giving a considerably greater flexibility to the allowance of bad debt deductions in the proper year.

Similarly, Section 6511(d)(2) was adopted because the general application of the statute of limitations could

foreclose use of loss carryback adjustments (H.R. Rep. No. 849, 79th Cong., 1st Sess. 6 (1945)):

> In order to provide a more equitable and adequate operation of the provisions for carry-back adjustments, the bill amends the provisions of existing law relating to the statute of limitations and computation of interest charges as applied to tax adjustments due to carry-backs. In general, these amendments are intended to assure that taxpayers will have an opportunity to claim carry-back adjustments in some instances where, under existing law, they would be prevented by the statute of limitations.

Congress thus elected to provide a series of narrowly-tailored statutory exceptions—rather than endorse a general "equitable" exception—to the limitations provisions of Section 6511.[14]

Only in the detailed situations described in Sections 1311-1314 of the Internal Revenue Code has Congress determined to permit untimely claims to be made. See 26 U.S.C. 1311(a) (permitting a claim within the scope of these provisions to be made even if otherwise "prevented by the operation of any law or rule of law"). These "mitigation" provisions of the Code were enacted to ameliorate the rigid application of the statute of limitations and to provide an

[14] At one time in the past, Congress adopted legislation that excused or reduced the interest rate on deficiencies for estates of "insane, deceased, or insolvent" persons. Revenue Act of 1918, ch. 18, § 250(e), 40 Stat. 1083-1084; Revenue Act of 1921, ch. 136, § 250(e), 42 Stat. 266. Congress eventually deleted that provision, having noted the difficulty of "determining with accuracy the time when a person becomes incompetent" (H.R. Conf. Rep. No. 356, 69th Cong., 1st Sess. 41 (1926)).

"equitable solution" to the problem that exists when the party that asserts the statute of limitations had, prior to the running of the statute, taken a position inconsistent with its current position. See S. Rep. No. 1567, 75th Cong., 3d Sess. 48-49 (1938). In enacting the "mitigation" provisions, Congress emphasized that "the essential function of the statute of limitations" was preserved unimpaired and that the "corrective adjustments" established in these provisions "should * * * never modify the application of the statute" in other contexts. *Ibid.* See also Statement of the House Managers, H.R. Rep. No. 2330, 75th Cong., 3d Sess. 57-58, 59 (1938).[15] As this Court stated in *United States* v. *Dalm*, an untimely suit for refund that "does not come within these provisions" may not proceed, for any other conclusion would impermissibly "overrid[e] Congress' judgment as to when equity requires that there be an exception to the limitations bar." 494 U.S. at 610.

b. There is manifestly an imperative need for predictability and certainty in the processes by which tax refund claims are resolved. More than 200,000,000 tax returns are filed each year.[16] The burdens that would be imposed on administrative and judicial resources by a statute of limitations that potentially

[15] The complex mitigation provisions of the Code would have been unnecessary if the statutes of limitations on refund claims were subject to tolling on equitable principles. See John M. Maguire et al., *Section 820 of the Revenue Act of 1938*, 48 Yale L.J. 509, 515-517, 725-726 (1939).

[16] That figure includes personal and corporate income tax returns, estate tax returns and employment tax returns. Internal Revenue Service, Compliance Research, Document 6186, *Calendar Year Return Projections for the United States and Service Centers: 1995-2002*, at 4-5 (Oct. 1995).

required consideration of the individual characteristics of 200,000,000 tax filers have long been regarded as unacceptable. As this Court has stated in *Rothensies* v. *Electric Battery Co.*, 329 U.S. at 301:

> It probably would be all but intolerable, at least Congress has regarded it as ill-advised, to have an income tax system under which there never would come a day of final settlement and which required both the taxpayer and the Government to stand ready forever and a day to produce vouchers, prove events, establish values and recall details of all that goes into an income tax contest. Hence, a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy.

The specific exceptions that Congress has provided from the limitations periods established in Section 6511 reflect the settled understanding of Congress that a general "equitable" exception does not exist from the statutory scheme. For example, even an event as cataclysmic as the Second World War—which unquestionably impeded the ordinary preparation of tax refund claims for many taxpayers—did not alter the strict time and substantive amount limitations contained in the refund claim provisions of the Internal Revenue Code. Instead, Congress found it necessary to enact a specific statutory exception to provide relief from those provisions.[17]

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[17] Section 507 of the Revenue Act of 1942, ch. 619, 56 Stat. 961, suspended the period of limitations for bringing a refund claim for reasons related to the ongoing war.

When Congress has confronted situations in which claims, though barred by the statute of limitations, nonetheless merit relief, it has responded either with detailed adjustments to the statute (such as the "mitigation" provisions) or with private bills.[18] Absent such specific relief by Congress, the statute of limitations for tax refund claims established by Section 6511(a)—and the substantive limitations on the amount recoverable on such claims imposed by Section 6511(b)—are to be enforced in accordance with their terms. By historic design and practice, and under the specific text of the provisions that Congress has enacted, these limitations on refund claims are not subject to the doctrine of equitable tolling. Thus, any change in the law in this area must come from Congress, not the courts.[19]

B. *IRWIN* V. *DEPARTMENT OF VETERANS AFFAIRS* DOES NOT SUPPORT A DIFFERENT CONCLUSION

Prior to this Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), no court had held that the provisions of Section 6511 applicable to tax refund claims were subject to equitable tolling. As the court of appeals noted in *Webb* v. *United States*, 66 F.3d at 694, the well-established rule was that all refund claims had to be filed within the limits established in Section 6511 and that equitable princi-

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[18] See, *e.g.*, Act of Sept. 16, 1959, Pub. L. No. 86-280, 73 Stat. 563 (allowing exception to Section 6511 for claim for overpayment by Dexter and Jeanette H. Phillips); see also S. Rep. No. 663, 89th Cong., 1st Sess. (1965).

[19] The Treasury Department has announced that it will submit proposals for modification of Section 6511 for consideration by Congress. See BNA Daily Tax Report G-8 (Mar. 21, 1996).

ples could not override those requirements. See page 21, *supra*.

The court concluded in this case, however, that the decision in *Irwin* radically altered the settled landscape and that the requirements of Section 6511 are now subject to equitable tolling (Pet. App. 3a-7a). As four other courts of appeals have concluded, however, that interpretation and application of this Court's decision in *Irwin* is not correct. See *Amoco* v. *Newton Sheep Co.*, *supra*; *Webb* v. *United States*, 66 F.3d at 699; *Oropallo* v. *United States*, 994 F.2d at 31; *Vintilla* v. *United States*, 931 F.2d 1444, 1446-1447 (11th Cir. 1991).[20]

1. The Rebuttable Presumption of Equitable Tolling Is Inapplicable to Tax Refund Claims

In *Irwin*, the Court held that a statutory 30-day period for commencing suit against the government under Title VII of the Civil Rights Act is subject to equitable tolling. The Court noted that it previously had held that the statutory time limits on suits under Title VII involving *private* defendants are subject to equitable tolling (498 U.S. at 95 & n.2, citing *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393-394 (1982)). The Court concluded, in this context, that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States" (498 U.S. at 95-96). The Court reasoned that such a

[20] In two decisions subsequent to *Vintilla*, the Eleventh Circuit declined to reconsider whether equitable tolling is applicable to tax refund suits because, even if equitable tolling *were* applicable, it would have been unavailable on the facts of those cases. *Rosser* v. *United States*, 9 F.3d 1519 (1993); *First Alabama Bank, N.A.* v. *United States*, 981 F.2d 1226 (1993).

presumption of equitable tolling is "likely to be a realistic assessment of legislative intent" (*id.* at 95). The Court emphasized, however, that the presumption is rebuttable and that particular legislation "may provide otherwise" (*id.* at 96).[21]

[21] The most general limitations provisions that Congress has enacted (which are not applicable to tax refund suits) are inconsistent with the assumption that Congress has, in the past, generally intended statutes of limitations on claims against the United States to be subject to equitable tolling. When Congress first authorized courts to enter judgments for money damages against the United States, it provided that claims were to be submitted "within six years after the claim first accrues" and then further provided (Act of Mar. 3, 1911, ch. 231, § 155, 36 Stat. 1139) (emphasis added):

> That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; *but no other disability than those enumerated shall prevent any claim from being barred* * * *.

These same provisions were also made applicable to proceedings in district courts seeking money judgments against the United States. See *id.* § 24, pt. 20, 36 Stat. 1093.

In *Kendall* v. *United States*, 107 U.S. 123, 125 (1883), the Court noted that Congress had specified "the cases to which the limitation of six years should not apply" and that "[t]he court cannot superadd to those enumerated, a disability arising [from any other cause, such as] sickness, surprise, or inevitable accident, which might prevent a claimant from suing within the time prescribed." The Court emphasized that a claimant must "comply with the terms upon which the government had consented to be sued" and that, in the absence of such compliance, "[h]is remedy, if the claim be a valid one, is to apply to

a. The "rebuttable presumption of equitable tolling" described by the Court in *Irwin* is inapplicable to the statutory provisions that limit tax refund

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the legislative department of the government" for private relief. *Id.* at 126.

In 1948, Congress revised these statutory provisions in the course of a general recodification of Title 28 of the Code. Since the time of that revision, Sections 2401 and 2501 of Title 28 have provided (respectively) that claims against the United States in the district courts and in (what is now) the Court of Federal Claims "shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases." 28 U.S.C. 2401(a); see 28 U.S.C. 2501. The Reviser's Notes to these Sections explain that the revised words " 'person under legal disability or beyond the seas at the time the claim accrues' were substituted for 'claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim' " and that the preexisting language "that disabilities other than those specifically mentioned should not prevent any action from being barred was omitted as superfluous." 28 U.S.C. 2401, 2501 (Reviser's Notes); H.R. Rep. No. 308, 80th Cong., 1st Sess. A185, A192 (1947).

In *Soriano* v. *United States*, 352 U.S. 270, 273 (1957), the Court again emphasized that these general statutes of limitations authorize an exception only for persons who are under a "legal disability" at the time the claim accrued and that courts have no authority to "superadd" or "engraft" additional exceptions to the statute. 352 U.S. at 273-274. The Court also specifically rejected the suggestion that causes that might be sufficient to toll claims in cases involving "private citizens" would suffice to toll claims against the United States, for such tolling principles involving private parties have "no applicability to claims against the sovereign. See *Haycraft* v. *United States*, 22 Wall. 81 (1875)." 352 U.S. at 275.

suits. A rebuttable presumption of equitable tolling necessarily depends upon—and may not be applied inconsistently with—a valid "assessment of legislative intent" (498 U.S. at 95), for only Congress may authorize money recoveries against the United States. U.S. Const. Art. 1, § 9, Cl. 7. Any judge-made rule altering the scope of statutory relief that Congress has authorized against the United States would violate this basic, constitutional principle. The proper focus of judicial inquiry into the meaning and application of a statute that permits or limits recovery upon claims against the United States has therefore always been a determination, from the text and history of the applicable provisions, of what remedy *Congress* intended. *United States* v. *Kubrick*, 444 U.S. 111, 125 (1979).

Nothing in *Irwin* is inconsistent with that conclusion. The Court acknowledged in *Irwin* that the rebuttable presumption that it described would apply only in the absence of an inconsistent expression of legislative intent. See 498 U.S. at 95. If, as in the present case, there is evidence in the text and history of the statute that Congress intended the limitations provisions to be strictly enforced, the "rebuttable presumption" described by the Court can play no role. The decision in *Irwin* does not purport to alter the constitutional principle that it is the intent of Congress that ultimately governs. See also *Bowen* v. *City of New York*, 476 U.S. 467, 479 (1986) (applying equitable tolling "[w]hen application of the doctrine is consistent with Congress' intent in enacting a particular statutory scheme").[2]

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[2] Moreover, as Justice White (joined by Justice Marshall) stated in a concurring opinion in *Irwin*, a "rebuttable pre-

b. The presumption of equitable tolling is inapplicable to (or is "rebutted" in the context of) tax refund suits because equitable tolling is inconsistent with the text and history of the applicable statutory provisions. Congress has left no room for doubt as to the consequences that are to attend any failure to make a tax refund claim within the specific time limits established in Section 6511(a). Section 6511(b)(1) specifies that "[n]o credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in [Section 6511(a)] for the filing of a claim for credit or refund, *unless a claim for credit or refund is filed by the taxpayer within such period*." 26 U.S.C. 6511(b)(1) (emphasis added). To reemphasize that same point, Congress further provided that, if any credit or refund *is* made on a claim submitted after the specific periods provided by Section 6511(a) have expired, that credit or refund is "erroneous" and is to be "considered void." 26 U.S.C. 6514(a).

The provisions of Section 6511(b) of the Code—which supplement and enforce the specific periods of limitation established in Section 6511(a)—do not themselves represent a "statute of limitations" for the commencement of a suit or the filing of a claim. Instead, Section 6511(b) establishes *substantive* limitations on the amount of recovery that (i) preclude

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sumption" of legislative intent that does not reflect the rules of construction that Congress understood and acted on when it adopted the statute under review is a questionable guide. See 498 U.S. at 99 n.2. Especially with respect to a statute that has a lineage as ancient as that of Section 6511 (see note 10, *supra*), any rule of construction first adopted in 1990 (see 498 U.S. at 95) must be applied with substantial deference to evidence of conflicting congressional intent.

any payment on a claim filed outside the express statutory periods established in Section 6511(a) and (ii) limit the amount of any refund to the "portion of the tax paid within" those express statutory periods —thereby precluding any refund of taxes for which an untimely claim was made. 26 U.S.C. 6511(b)(1), (b)(2)(A)-(C).

For example, under Section 6511(b)(2)(A), if a taxpayer files a claim for refund within three years of the filing of the return, as "prescribed in [Section 6511](a), the *amount* of the credit or refund *shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years* plus the period of any extension of time for filing the return." 26 U.S.C. 6511(b)(2)(A) (emphasis added). This statutory scheme is manifestly inconsistent with equitable tolling: even if a claim that is filed late were "allowed" on equitable grounds (contrary to the express prohibition of Section 6511(b)(1)), the "amount of the credit or refund" on such a claim could "not exceed the portion of the tax" paid within three years of the claim (26 U.S.C. 6511(b)(2)(A)). Thus, when (as in the present case) the refund claim is filed *more* than three years after the tax was paid, no "amount" could be paid on the claim under Section 6511(b)(2)(A).

Section 6511(b)(2)(B) is equally specific in this regard. It provides that, "[i]f the claim was not filed within" three years of the time the return was filed, then "the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim." 26 U.S.C. 6511(b)(2)(B). Under this provision, even if the untimely claims of respondents were "allowed" on equitable grounds (see 26 U.S.C. 6511(b)(1)), the

"amount of the credit or refund" permitted would be "zero"—for that is the "portion of the tax paid during the 2 years immediately preceding the filing of the claim."

Because Section 6511(b) thus imposes *substantive*, rather than procedural, limitations on tax refund recoveries, the requirements of that Section are not subject to modification under the doctrine of equitable tolling. The doctrine of equitable tolling is confined, by its terms, to statutes of limitations. The doctrine can not be applied to alter the substantive terms of the statute under which respondents seek relief. As this Court observed in *Irwin*, it is the "[t]ime requirements in lawsuits between private litigants" that are subject to the doctrine of equitable tolling. 498 U.S. at 95. In each instance that this Court has considered the doctrine, that premise has governed. See, *e.g.*, *Honda* v. *Clark*, 386 U.S. 484 (1967); *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 558-559 (1974); *Bowen* v. *City of New York*, 476 U.S. at 480. When a statutory condition *other* than a period of limitations for a filing requirement is at stake, the Court has made it clear that equitable tolling does not provide relief from the statutory conditions to recovery. See *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 27 (1989) (pre-lawsuit notification requirement not a statute of limitations and not subject to equitable tolling).

As the court of appeals noted in *Webb* v. *United States*, the limitations on recovery set forth in Section 6511(b) establish a "substantive right" to be free from liability after a legislatively determined period of time. 66 F.3d at 700, citing *First United Methodist Church* v. *United States Gypsum Co.*, 882 F.2d 862, 865-866 (4th Cir. 1989), cert. denied, 493 U.S. 1070

(1990); *Goad* v. *Celotex Corp.*, 831 F.2d 508, 510-511 (4th Cir. 1987), cert. denied, 487 U.S. 1218 (1988). See also *Amoco* v. *Newton Sheep Co.*, *supra*; *Oropallo* v. *United States*, 994 F.2d at 30-31. Statutes that define substantive, rather than merely procedural, limitations on liability are not subject to tolling doctrines (*First United Methodist Church* v. *United States Gypsum Co.*, 882 F.2d at 866). That principle applies *a fortiori* to monetary claims against the United States, for only Congress may determine the conditions upon which the United States consents to be sued.

c. These substantive limitations prescribed in the Internal Revenue Code confirm that Congress has insisted upon a definite and unyielding point of repose for tax refund claims. In this context, as in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), the "rebuttable presumption" of equitable tolling described in *Irwin* is inapplicable because the statutory scheme reflects a legislative policy of repose that is inconsistent with equitable tolling.[23]

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[23] The court of appeals stated in the present case that the presumption of equitable tolling applies to tax refund suits because "Congress has never expressed any intention that equitable tolling should not apply to § 6511" (Pet. App. 5a). For the reasons discussed in the text, that conclusion cannot be reconciled with the words of the statute.

Moreover, by adopting a "rebuttable presumption" of equitable tolling in *Irwin*, the Court obviously did not place on Congress the burden of thereafter reviewing the entire United States Code to specify which statutes are, and which are not, subject to equitable tolling. As the Court has observed, "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard* v. *United States*, 328 U.S. 61, 69 (1946). See also *Central Bank* v. *First*

In *Lampf*, the Court held that equitable tolling does not apply to the federal statute of limitations that requires claims for violations of the securities laws to be brought "within one year after the discovery of the facts constituting the violation and within three years after such violation." 15 U.S.C. 78i(e). The Court held that tolling principles did not apply to this statute because the 3-year limitation provision necessarily served as a "cutoff" of claims and established "a period of repose inconsistent with tolling." 501 U.S. at 363.[24]

In this case, as in *Lampf*, the detailed provisions of Section 6511(a) and Section 6511(b) establish a statutory "period of repose inconsistent with tolling." Thus, in explaining that the structure of Section 6511 is inconsistent with equitable tolling, the First Circuit stated in *Oropallo* v. *United States*, 994 F.2d at 30-31:

> We think that section 6511(a) and (b)(2)(A) are structured like the 1-and-3-period considered by

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Interstate Bank, 114 S. Ct. 1439 (1994) (rejecting suggestion that congressional inaction constitutes acquiescence in judicial pronouncements).

[24] The reasoning of *Lampf* has been applied in several statutory contexts. See, *e.g.*, *Central States Pension Fund* v. *Navco*, 3 F.3d 167 (7th Cir. 1993) (holding that equitable tolling is not applicable to the limitations period contained in the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. 1451(f)), cert. denied, 114 S. Ct. 1062 (1994); *Smith* v. *Secretary of the Department of Health and Human Services*, 26 Cl. Ct. 116 (holding that equitable tolling is not applicable under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. 300aa-1 to 300aa-33), aff'd, 983 F.2d 1088 (Fed. Cir. 1992) (Table). See also *Larson* v. *Northrop Corp.*, 21 F.3d 1164, 1174-1175 (D.C. Cir. 1994).

> the Supreme Court in *Lampf*. Under section 6511, a taxpayer who has filed a return must clear two time barriers. The first one is in section 6511(a), which requires taxpayers to file a refund claim within three years of filing a return. * * *
>
> * * * * *
>
> * * * Under section 6511(b)(2)(A) he may [then] recover any taxes paid in the immediately preceding three-year period * * * . Unquestionably, then, that date serves as an absolute cutoff point. By imposing an "outside limit" or "cutoff" on the amount of taxes which can be recovered, section 6511(b)(2)(A) operates like the three-year portion of the limitations period in *Lampf*, and thus is a "period of repose inconsistent with tolling."

The period of repose established by Section 6511 is not subject to equitable tolling (*Webb* v. *United States*, 66 F.3d at 700-701, quoting *First United Methodist Church* v. *United States Gypsum Co.*, 882 F.2d at 866):

> That § 6511(b)(2) is analogous to a statute of repose is significant given the well-recognized distinctions between statutes of limitations and statutes of repose. While the former is "a procedural device that operates as a defense to limit the remedy available from an existing cause of action," a statute of repose, in contrast, "creates a substantive right in those protected to be free from liability after a legislatively-determined period of time."

As a "statute of repose," Section 6511 establishes "an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body." *Amoco* v. *Newton Sheep Co.*, *supra*, quoting *United States Gypsum Co.*, 882 F.2d at 866.

d. In *United States* v. *Dalm*, the Court held that an equitable claim for the recovery of taxes may not be pursued when it is first asserted after the statute of limitations in Section 6511 has expired. 494 U.S. at 610. The Court noted that Congress has carefully articulated the exceptions that are available from the specific, detailed limitations contained in Section 6511. The Court concluded that an untimely suit for refund that does not come within those specific statutory exceptions may not proceed, for any other conclusion would "override[e] Congress' judgment as to when equity requires that there be an exception to the limitations bar." 494 U.S. at 610.

The decision in *Dalm* was "almost contemporaneous with the rule announced in *Irwin*." *Webb* v. *United States*, 66 F.3d at 698. Nothing in *Irwin* "purport[s] to modify" the analysis of the Internal Revenue Code that the Court applied in *Dalm*. *Ibid.* Under that analysis, the detailed and comprehensive limitations on tax refund claims established in Section 6511 require the conclusion "that equity is not to displace the strict time limits set forth in the Internal Revenue Code." *Ibid.*

2. The Rebuttable Presumption of Equitable Tolling Described in *Irwin* Is Premised Upon Equal Treatment of Private and Government Remedies

The crucial focus of the Court's reasoning in *Irwin* was that "[e]qual treatment of private and government defendants" should be a presumptive norm, in the absence of contrary evidence of legislative intent. *Webb* v. *United States*, 66 F.3d at 696. See also *Glarner* v. *United States*, 30 F.3d 697, 701 (6th Cir. 1994); *Justice* v. *United States*, 6 F.3d 1474, 1478 (11th Cir. 1993); *Nunnally* v. *MacCausland*, 996 F.2d 1, 2-3 (1st Cir. 1993).

> [I]n *Irwin*, the Supreme Court held that where equitable tolling applies in a particular action between private parties, it similarly applies in such an action against the government. This makes sense as a "realistic assessment of legislative intent," for unless specified otherwise, there is no reason to assume that Congress would intend to make it inherently more difficult to bring suit against the government than against a private defendant. * * * The Court's express goal in *Irwin* was to level the playing field between private litigants and the government.

Webb v. *United States*, 66 F.3d at 697 (footnote omitted). Thus, "when equitable tolling applies in a case brought against a private litigant, it follows that equitable tolling should presumptively apply in a comparable case against the United States." *Ibid.*

As the court concluded in *Webb* v. *United States*, 66 F.3d at 697-698, however, that understanding of the rationale of *Irwin* is inconsistent with any presump-

tion that equitable tolling should apply in cases involving tax refund claims:

> Unlike tort actions or employment disputes, however, tax refund cases cannot be brought against private litigants, nor are they even comparable to suits that can be brought against private litigants. * * *
>
> * * * * *
>
> By definition, * * * tax refund suits are limited to cases where a taxpayer is suing the government for a refund. Because tax refund suits are always brought against the government, never against private parties, the presumption announced in *Irwin* does not apply to them. Since there can be no equitable tolling in such suits against private defendants, the rule in *Irwin* that "the *same* rebuttable presumption of equitable tolling *applicable to suits against private defendants* should also apply to suits aginst the United States" has no force here.

As the court stated in *Webb*, "[a]pplying the doctrine of equitable tolling in a tax refund action * * * would neither serve as a 'realistic assessment of legislative intent' nor as a 'practically useful principle of interpretation,' and nothing counsels a departure here from the traditional judicial reluctance to introduce equitable principles into the tax laws." 66 F.3d at 698.

3. No Refund May Be Allowed Even If The Limitation On Filing Claims Were Tolled

Even if principles of equitable tolling were applicable to the statute of limitations established in Section

6511(a) for tax refund claims, any recovery by respondents would be barred by the substantive limitations on the "amount" of refunds set forth in Section 6511(b). Because the taxes were paid more than three years before the claims for refund were filed, no "portion of the tax" may be refunded under the express mandate of Sections 6511(b)(2)(A) and (B). See pages 32-34, *supra*. Thus, even "apart from the limitation period imposed by section 6511(a)," respondents cannot prevail on their refund claims in this case as a matter of substantive law. *Amoco* v. *Newton Sheep Co.*, *supra*.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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In The
Supreme Court Of The United States
October Term 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

MARIAN MCCLAMY, ADMINISTRATOR OF THE ESTATE OF STANLEY R. McGILL,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

v.

NICHOLAS T. SCOTT

Respondent.

On Writs Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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QUESTION PRESENTED

Whether the doctrine of equitable tolling, presumed to apply to claims against the government, as expressed in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), is applicable to toll limitations periods for tax refund claims under 26 U.S.C. §§6511(a) and (b).

TABLE OF CONTENTS

Page

STATEMENT 1

SUMMARY OF ARGUMENT..... 5

ARGUMENT 7

NO GROUND EXISTS FOR NOT APPLYING THE REBUTTABLE PRESUMPTION IN FAVOR OF EQUITABLE TOLLING IN THE CONTEXT OF TAX REFUND CLAIMS..... 7

A. THE LEGISLATIVE HISTORY OF TAX REFUND LITIGATION SUPPORTS A CONCLUSION THAT CONGRESS INTENDED EQUITABLE TOLLING TO APPLY TO SUCH SUITS 7

B. THE STRUCTURE OF §6511 IS SUCH THAT IF THE PERIODS IN §6511(a) ARE AMENABLE TO TOLLING, THE "LOOK-BACK" PERIODS IN §6511(b) SHOULD BE TOLLED FOR THE SAME PERIODS 13

C. THE LEGISLATIVE HISTORY OF §6511(b) REVEALS THAT THE "LOOK-BACK" PERIODS OF §6511(b) WERE NOT INTENDED TO BE ABSOLUTE BARS, BUT WERE INTENDED TO MAKE THE TIME THAT A TAXPAYER HAS TO FILE A REFUND CLAIM CO-EXTENSIVE WITH THE PERIOD THAT THE COMMISSIONER HAS TO ASSESS A TAX AGAINST THE TAXPAYER 13

D. THE OVERALL STRUCTURE OF OUR SYSTEM OF TAX COLLECTION, BASED AS IT IS UPON SELF-ASSESSMENT, SUPPORTS A CONCLUSION THAT CONGRESS INTENDED EQUITABLE TOLLING TO APPLY TO TAX REFUND CLAIMS 22

TABLE OF CONTENTS – Continued

Page

E. IN THE EVENT THAT THE PERIOD THAT A TAXPAYER HAS TO FILE A REFUND CLAIM IS TOLLED, THE PERIOD THAT THE COMMISSIONER HAS TO ASSESS ADDITIONAL TAX SHOULD BE TOLLED FOR A COMMENSURATE PERIOD..... 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES:

Bull v. United States, 295 U.S. 247 (1935) 3

Capital Tracing, Inc. v. United States, 63 F.3d 859 (9th Cir. 1995) 12

Cary v. Curtis, 44 U.S. (3 How.) 236 (1845) 8

City of Philadelphia v. The Collector, 72 U.S. (5 Wall) 720 (1867) 9

Commissioner v. Dane-Wells, 321 U.S. 219 (1994) 23

Commissioner v. Lundy, ___ U.S. ___ (1996) 13

Curits's Administratrix v. Fiedler, 67 U.S. (2 Black) 461 (1862) 7

Elliott v. Swartwout, 35 U.S. (10 Pet.) 137 (1836) 7, 8, 9

Flora v. United States, 362 U.S. 145 (1960) 7, 10

Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990) 5, 12, 23

Jones, Collector v. Liberty Glass Co., 332 U.S. 524 (1947) 17

Lewis v. Reynolds, 284 U.S. 281 (1932) 10

Medellin v. Shalala, 23 F.3d 197 (8th Cir. 1994) 12

Miller v. United States, 38 F.3d 473 (9th Cir. 1994) 19

Nunnally v. MacCausland, 996 F.2d 1 (1st Cir. 1993) 12

Oropallo v. United States, 994 F.2d 25 (1st. Cir. 1993), *cert. denied*, 114 S. Ct. 705 (1994) 3, 19, 20

Smietanka, Collector v. Indiana Steel Co., 257 U.S. 1 (1927) 9

TABLE OF AUTHORITIES – Continued

Page

Stone v. White, 301 U.S. 532 (1937) 7

United States v. Arthur Young & Co., 465 U.S. 805 (1984) 22

United States v. Dalm, 494 U.S. 596 (1990) 3

United States v. Felt & Tarrant Mfg., Co., 283 U.S. 269 (1931) 9, 23

United States v. Jefferson Electric, 291 U.S. 386 (1933) 8

United States v. Kales, 314 U.S. 186 (1933) 9, 10

United States v. Williams, ___ U.S. ___ (1995) 9

Webb v. United States, 66 F.3d 691 (4th Cir. 1995), *petition for cert. pending*, No. 95-1360 12

STATUTES:

Act of Feb. 26, 1845, ch. 22, 5 Stat. 727 8

Act of March 3, 1839, 5 Stat. 339 8

Act of March 3, 1887, ch. 359, 24 Stat. 505 (Tucker Act) 10

Act of March 4, 1923, ch. 276, §252(a), 42 Stat. 1504 15

Act of July 30, 1954, ch. 648, §1, 68 Stat. 589 10

Internal Revenue Code of 1939 (26 U.S.C.) 17

§322 ..... 17, 18

§322(b)(1) 18, 19

§322(b)(3) 17

TABLE OF AUTHORITIES – Continued

Page

Internal Revenue Code of 1954 (26 U.S.C.)
§6511(a) 18, 19
Internal Revenue Code of 1986 (26 U.S.C.)
§6511 ..... *passim*
§6511(a) ..... *passim*
§6511(b) ..... *passim*
§6511(b)(2)(A) 13, 20
§6511(b)(2)(B) 13
§7422(f) 11
§7422(f)(1) 11
Pub. L. 89-713, §2(a), 89th Cong. 2d Sess. 11
Revenue Act of 1916, ch. 463, §14(a), 39 Stat. 756 13
Revenue Act of 1918, ch. 18, §252, 40 Stat. 1057 14
Revenue Act of 1924, ch. 234, §281(b), 43 Stat. 301 §1014, 43 Stat. 343 ..... 9, 15, 17
Revenue Act of 1942, ch. 619, Pub. L. No. 753, §169 17
Rev. Stat. §989 (1875) 9
Technical Amendments Act of 1958, §82 20
28 U.S.C. §842 9
28 U.S.C. §1346(a)(1) 11

TREATISES:

15 Mertens, *Law of Federal Income Taxation*, §58.02 (1996) 18, 20
M. Saltzman, *IRS Practice and Procedure*, ¶ 11.05 at 11-26 - 11-27 (1996) 22

TABLE OF AUTHORITIES – Continued

Page

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J. Seidman, Legislative History of Federal Income Tax Laws, 1938-1861 (1938) 14, 16

MISCELLANEOUS:

Bianco, *Tax Refund Suits and Equitable Tolling of the Statute of Limitations: Webb v. United States*, 49 Tax Lawyer 747 (1996). 12
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H.R. Rep. No. 2333, 77th Cong. 2d Sess. (1942). 17
Plumb, Jr. *Tax Refund Suits Against Collectors of Internal Revenue*, 60 Harv. L. Rev. 685 (1947) 8
S. Rep. No. 398, 68th Cong. 1st Sess 33 (1924) 16
S. Rep. No. 617, 65th Cong., 3rd Sess. 10 14
S. Rep. No. 1625, 3 U.S. Code Cong. & Admin. News 3681 (1966). 11
Stand. Fed. Tax Rep., Sept. 4, 1958 (CCH) ("1958 Federal Income Tax Law Changes Explained,") ¶ 291, No. 39 20
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Treas. Reg. §301.6402-2(b) 23

STATEMENT

A. *United States v. Brockamp*

1. Respondent Marian Brockamp is the administrator and sole beneficiary of the estate of her father, Stanley McGill. On or about April 16, 1984, Mr. McGill, then aged 93, issued a personal check in favor of "Internal Revenue Service" in the sum of $7,000. The check did not indicate whether the $7,000 remittance was for income, gift or any other type of tax, or the period for which the remittance applied. Mr. McGill did not file an income tax return for 1983 or for any of the five remaining years of his life, and the $7,000 remittance was the last he ever made. When the check was received by the Internal Revenue Service, it was placed in a "suspense" account, and on July 15, 1986 was transferred into an "Excess Collection Account." (Pet. App. 2a-3a.) The Service never made an assessment of the $7,000. (Pet. App. 22a.)

2. Beginning in the late 1970's, Mr. McGill's health began to deteriorate, and he developed the classic symptoms of senile dementia. He began to look dazed and disoriented, and would walk about the house naked, unaware of his nakedness. On one occasion, he went to the corner mailbox in a state of undress, and when confronted with his act, was unaware of what had happened. He could no longer remember recent conversations. He would begin to dial a telephone, and suddenly forget whom he was calling. He developed troubles with his checkbook; bills for $1000 and $400 would be paid with checks for $1,000 and $4,000. As a result of his dangerous forgetfulness, Respondent convinced Mr. McGill to give

her son some checkwriting authority, and he agreed. It is likely, however, that he forgot this conversation as well.[1]

3. In response to Requests for Admissions, Petitioner admitted that Mr. McGill, who had long since retired, did not have an income in 1983 that could have resulted in a $7,000 tax liability. (Pet. App. 7a.)

4. Following Mr. McGill's death on November 7, 1988, Respondent discovered the $7,000 check in Mr. McGill's belongings. After she was appointed administrator of his estate, she wrote the IRS, requesting that the $7,000 be returned. The Service refused, noting that the taxes had been paid "more than three years prior to her claim." (Pet. App. 18a-19a.)

5. Respondent thereafter commenced this tax refund action, alleging, *inter alia*, that the general rule enunciated in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), *viz.*, that the doctrine of equitable tolling applies against the Government to the same extent that it applies against private parties, should apply with equal force to tax refund suits. (Pet. App. 3a.)[2]

6. In granting the Petitioner's Motion for Summary Judgment, the District Court relied principally on the

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[1] As the district court litigation was determined upon the Petitioner's Motion for Summary Judgment, the foregoing factual recitation is derived from Respondent's Declaration.

[2] The District Court litigation was decided upon Cross-Motions for Summary Judgment. The gravamen of the Respondent's Motion for Summary Judgment was that since the IRS had never assessed the $7,000 remittance, it was not a "payment" of tax, but remained in the nature of a refundable deposit.

First Circuit's decision in *Oropallo v. United States*, 994 F.2d 25 (1993), *cert. denied*, 114 S. Ct. 705 (1994), and this Court's decision in *United States v. Dalm*, 494 U.S. 596 (1990). In *Oropallo*, the First Circuit held that the limitations periods imposed by §6511 of the Internal Revenue Code and the doctrine of equitable tolling were "fundamentally inconsistent." In *Dalm*, this Court, limiting its holding in *Bull v. United States*, 295 U.S. 247 (1935) held that the doctrine of equitable recoupment could not be the sole ground for extending the limitations periods of §6511.

7. The court of appeals reversed, Judge Fernandez dissenting. In holding that equitable tolling could, in an appropriate case, toll the periods of limitations contained in §6511, the court noted that this Court's decision in *Irwin* was subsequent to, and effectively modified, this Court's decision in *Dalm*. In so doing, the Court of Appeals observed:

> "We think the facts as alleged by Mrs. Brockamp demonstrate why equitable tolling should apply in some tax cases. In this instance, it would be unconscionable to allow the government to retain money that it concedes it was not owed, and have only received due to a 93 year-old man's senility." (Pet. App. 6a-7a.)

8. The court of appeals concluded that a triable issue of fact existed as to Mr. McGill's incompetence. Accordingly, it remanded the case to the district court for further proceedings.

B. *United States v. Scott*

1. From the early 1980's through at least early November, 1989, respondent Nicholas Scott (herein "Scott") was a severe alcoholic. (Pet. App. 37a.) In 1984, Scott's father, Gene Scott, acting under a power of attorney, made installments of Scott's estimated tax payments for 1984. (Pet. App. 37a.)

2. In 1989, Scott filed a tax return for 1984, claiming that he had no tax liability for 1984 and requesting a refund for amounts he had previously paid. The Internal Revenue Service denied the requested refund due to the expiration of the statute of limitations for filing a claim, based on §6511. (Pet. App. 32a.)

3. Scott brought suit following the denial of his refund claim. The district court, sitting as trier of fact, found that Scott was mentally incompetent throughout the relevant period. (Pet. App. 33a.) The district court concluded that the doctrine of equitable tolling applies in tax refund suits, and that the limitations contained in §6511 should not be applied to a person such as Scott, whose alcoholism "rendered him mentally incompetent and unable to file a tax return from January 1985 through November 1989." (Pet. App. 33a.)

4. The court of appeals affirmed, relying on the decision entered the same day by the same panel in *United States v. Brockamp*, with Judge Fernandez dissenting on the same grounds as his dissent in *Brockamp*.

SUMMARY OF ARGUMENT

A. In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court enunciated a broad rule that, once Congress has waived the Government's sovereign immunity in an area, the same rebuttable presumption of equitable tolling applicable in suits between private litigants also should apply to suits against the United States. Neither the structure of §6511 of the Code, nor the legislative history of tax refund claims, nor the legislative history of §6511, nor the overall scheme of the administration of tax collection, indicates that this rebuttable presumption should not be applied to tax refund litigation. To the contrary, although express legislative intent is sparse, the legislative history indicates Congressional intent that equitable tolling be permitted with respect to tax refund litigation.

B. The history of tax refund litigation indicates that a suit to recover overpaid taxes has been, from its inception, a common law action for money had and received, which from 1836 until 1966 could be brought against individual Collectors. Throughout this period, such suits were presumptively subject to equitable tolling, just as any suit for money had and received against a private party. When Congress finally eliminated the right to sue a Collector individually in 1966, Congress did not manifest any intent to change the nature of the action or to restrict the amenability of such suits to equitable tolling.

C. The §6511(b) limitations on the amount of a refund claim incorporate by reference the filing periods contained in §6511(a). If the time that a taxpayer has to file a refund claim is amenable to tolling, the "look-back"

periods contained in §6511(b) are tolled to the same extent. Sections 6511(a) and 6511(b) should thus be read in the conjunctive, not in the disjunctive. The legislative history of §6511 supports such an interpretation.

D. The legislative history of §6511 reveals that Congress' intent in enacting the "amount" limitations contained in §6511(b) was to prevent a taxpayer from keeping the period for filing a refund claim open indefinitely by paying a de minimis amount of tax. Specifically, the "look-back" periods in §6511(b) were designed to be co-extensive with the period of time the Commissioner has to assess a tax against the taxpayer. Section 6511(b) has no application to a disabled taxpayer who has no ability to assess his own tax and (as was the case with Mr. Stanley McGill) against whom the statute of limitations against the Commissioner never began to run.

E. The overall structure of tax collection is based upon each taxpayer assessing his or her own tax. No Congressional policy is violated by extending the period for refund claims where an overpayment is the result of the taxpayer's inability to assess his own tax.

F. In the event that the period that the taxpayer has to file a refund claim is equitable tolled, the period that the Commissioner has to assess additional tax against the taxpayer should be tolled commensurately. Such a rule would be consistent with Congress' intent to make the period that the taxpayer has to file a refund claim co-extensive with the period that the Commissioner has to assess the underlying tax.

ARGUMENT

NO GROUND EXISTS FOR NOT APPLYING THE REBUTTABLE PRESUMPTION IN FAVOR OF EQUITABLE TOLLING IN THE CONTEXT OF TAX REFUND CLAIMS.

A. THE LEGISLATIVE HISTORY OF TAX REFUND LITIGATION SUPPORTS A CONCLUSION THAT CONGRESS INTENDED EQUITABLE TOLLING TO APPLY TO SUCH SUITS.

Until the creation of the Court of Claims in 1855, no suit could be brought directly against the United States in any forum. However, as early as 1836, this Court, in *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137 permitted suits for the refund of overpaid taxes to be brought against individual Collectors. Without the benefit of statutory authority, such suits were based upon the common law action for money had and received. *Flora v. United States*, 362 U.S. 145 (1960). Used to recover upon rights equitable in nature to avoid unjust enrichment, they were the "lineal successor[s] of the common count of indebitatus assumpsit for money had and received." *Stone v. White* 301 U.S. 532, 534 (1937), "founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff." *Curtis's Administratrix v. Fiedler*, 67 U.S. (2 Black) 461 (1862). Such suits were equitable in nature,

> " . . . less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds the money, which *ex aequo et*

> *bono* belongs to the plaintiff. . . . It approaches nearer a bill in equity than any other common law action." *United States v. Jefferson Electric*, 291 U.S. 386, 402 (1933) *citing Claflin v. Godfrey*, 38 Mass. 1, 6."

As such suits were legal actions brought against individuals, they were presumptively amenable to equitable tolling, just as any action for money had and received brought against a private individual. Beginning in 1836, *and for the next 130 years*, refund suits in the nature of common law actions for money had and received could be maintained against individual Collectors for the refund of overpaid taxes.[3]

As a result of this Court's holding in *Elliott v. Swartwout*, Collectors began withholding tax collections, for fear that they could be personally liable for taxes wrongfully collected. To thwart this, Congress, in the Act of March 3, 1839, 5 Stat. 339, required Collectors to remit all taxes collected to the Treasury. In 1845, this Court, in *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845), held that, as a result of the Act of March 3, 1839, individual Collectors merely performed the ministerial act of collecting and remitting for the Treasury. Consequently, no right of action against Collectors for refund existed.

Congress' reaction was swift and decisive. Within weeks of this Court's decision in *Cary v. Curtis*, Congress enacted the Act of February 26, 1845, 5 Stat. 727, which expressly restored the taxpayer's right to sue for refund.

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[3] The history of refund actions against Collectors was extensively reviewed in Plumb, Jr. *Tax Refund Suits Against Collectors of Internal Revenue*, 60 Harv. L. Rev. 685 (1947).

Elliott v. Swartwout dealt with customs duties wrongfully collected. In *Elliott*, this Court required that the taxpayer protest the exaction of the tax as a prerequisite to a refund suit, because a sum of money *voluntarily* paid could not form the basis of a common law action for money had and received.[4] *United States v. Williams*, ___ U.S. ___ (1995). The present requirement that a refund suit be preceded by a refund claim thus originated in the common law action for money had and received. In 1866, this Court, in *City of Philadelphia v. The Collector*, 72 U.S. (5 Wall.) 720 (1867) extended the common law action for money had and received to actions for the recovery of internal revenue taxes, noting that:

> "there is no more appropriate or effectual remedy known to the common law than an action for assumpsit for money had and received, as in this case." *Id.* at 733.

In 1875, Congress acted to indemnify Collectors. Rev. Stat. §989; 28 U.S.C. §842 (1940). But the indemnification was not automatic. In order to be indemnified, the Collector required certification by a court that there was probable cause for the act done by the Collector. *United States v. Kales*, 314 U.S. 186 (1941).

The truly private nature of the action against the Collector is evidenced by the fact that if the individual Collector who had exacted the tax died during the pendency of the refund action, the action could not be maintained against his successor in office; the action could be

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[4] The prerequisite of a protest was eliminated by statute in 1924. Revenue Act of 1924 at §1014, 43 Stat. 343.

continued only against the estate of the deceased Collector. *Smietanka, Collector v. Indiana Steel Co.*, 257 U.S. 1 (1921).

The Government first became directly amenable to suits for tax refunds with the enactment of the Act of March 3, 1887, 24 Stat. 505, commonly known as the Tucker Act. But the Tucker Act did not, and was not intended, to impose any new conditions on the pre-existing right to sue the Collector for tax refunds. *Flora v. United States*, 362 U.S. 145, 189 (1960) (Whittaker, J. dissenting). Indeed, if the taxpayer's claim was for an amount in excess of $1,000 (later increased to $10,000) the taxpayer's only action was a suit against the Collector. Even if the amount was under the jurisdictional ceiling, the taxpayer had the option to sue the Collector for refund. Significantly, the enactment of the Tucker Act did not change the nature of the action against the Collector, which continued to be a common law action for money had and received against a private individual. *United States v. Kales*, 314 U.S. 186, 200 (1941). *Accord: Lewis v. Reynolds*, 284 U.S. 281, 283 (1932).

The dual nature of tax refund suits continued into the modern era, with the taxpayer having the choice of suing the Collector individually, or the United States directly, either in District Court up to the jurisdictional amount, or in the Court of Claims without regard to the jurisdictional amount. Not until 1954, with the enactment of the Act of July 30, 1954, ch. 648, 68 Stat. 589, §1, was the $10,000

ceiling on refund suits brought in District Court eliminated.[5]

The right of the taxpayer to sue the individual District Director (formerly the Collector) was not abrogated until 1966, with the enactment of §7422(f)(1) of the Code.[6] But the legislative history of this provision reveals that such suits were eliminated to aid the practitioner, who prior thereto had been caught in the trap of either suing the wrong Collector, or having had the right Collector die during the pendency of the litigation. The Senate Report also reveals that the right to sue the District Director was eliminated because the number of District Directors was reduced from 58 to seven, Congress fearing that these suits would thus be concentrated in seven districts. S. Rep. No. 1625, 3 U.S. Code Cong. & Admin. News 3681 (1966).

Nowhere does the 1966 legislative history reveal any intention on the part of Congress to change the nature of tax refund litigation from what it had been since 1836, *viz*, a common law action on a debt.

As the Petitioner correctly notes, the ability to bring a refund suit against a Collector began in 1836, yet the requirement that such a suit be preceded by a refund claim was not enacted until 1875. But contrary to the

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[5] Also eliminated as no longer necessary was the provision that a refund suit for an amount in excess of $10,000 could be maintained if the Collector was either dead or no longer in office. With this provision, 28 U.S.C. §1346(a)(1), the direct descendent of the Tucker Act, assumed its current form.

[6] Section 7422(f) was added by §2(a) of Pub. L. 89-713, 89th Cong. 2d Sess.

Petitioner's assertions, nowhere does the legislative history of tax refund litigation indicate an "inflexible" requirement that refund claims be timely filed and not be amenable to tolling in a proper circumstance. Since 1836, tax refund suits have been in the nature of common law actions for money had and received. At least until 1966, they were as amenable to equitable tolling as any common law action against a private party, and nothing in the 1966 legislation reveals an intent on Congress' part to abridge the amenability of such suits to equitable tolling.[7]

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[7] In *Webb v. United States*, 66 F.3d 691 (1995), the Fourth Circuit distinguished this Court's holding in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), by limiting the rebuttable presumption in favor of equitable tolling to those cases where comparable causes of action may be brought against a private individual and the Government, holding:

> " . . . when equitable tolling applies in a case brought against a private litigant, it follows that equitable tolling should presumptively apply in a comparable case against the United States." *Id.* at 697.

This interpretation of this Court's holding in *Irwin* was not advanced by the Petitioner either in *Webb* or in either of the consolidated cases at bar. It is apparent that, in holding that equitable tolling is inapplicable to tax refund claims, the Fourth Circuit was unaware that actions seeking the refund of overpaid taxes were maintainable against *private litigants* for 130 years. Since *Irwin*, courts have consistently applied equitable tolling in suits against the Government without reference to whether a particular statute allows suits against both the Government and a private party. *See, e.g., Capital Tracing, Inc. v. United States*, 63 F.3d 859 (9th Cir. 1995) [wrongful tax levy action]; *Medellin v. Shalala*, 23 F.3d 197 (8th Cir. 1994) [Social Security Act]; *Nunnally v. MacCausland*, 996 F.2d 1 (1st Cir. 1993) [Civil Service Reform Act]. The Fourth Circuit's holding in *Webb* has been severely criticized in Bianco, *Tax Refund Suits and Equitable Tolling of the Statute of Limitations: Webb v. United States*, 49 Tax Lawyer 747 (1996).

B. THE STRUCTURE OF §6511 IS SUCH THAT IF THE PERIODS IN §6511(a) ARE AMENABLE TO TOLLING, THE "LOOK-BACK" PERIODS IN §6511(b) SHOULD BE TOLLED FOR THE SAME PERIODS.

As this Court recently observed in *Commissioner v. Lundy*, ___ U.S. ___ (1996) the "look-back" periods contained in §6511(b)(2)(A) and §6511(b)(2)(B), which limit the amount of any refund, incorporate by reference the claim-filing periods of §6511(a).

If the periods in which a taxpayer is required to file a refund claim are amenable to equitable tolling, the "look-back" periods contained in §6511(b)(2), which incorporate these periods by reference, should be amenable to tolling to the same extent. The legislative history of §6511(b) and its predecessors supports this conclusion.

C. THE LEGISLATIVE HISTORY OF §6511(b) REVEALS THAT THE "LOOK-BACK" PERIODS OF §6511(b) WERE NOT INTENDED TO BE ABSOLUTE BARS, BUT WERE INTENDED TO MAKE THE TIME THAT A TAXPAYER HAS TO FILE A REFUND CLAIM CO-EXTENSIVE WITH THE PERIOD THAT THE COMMISSIONER HAS TO ASSESS A TAX AGAINST THE TAXPAYER.

The first statutory provision permitting the filing of a claim for the refund of income taxes was contained in §14(a) of the Revenue Act of 1916, Pub. L. No. 271, ch.

463, 39 Stat. 772, §14(a).[8] However, it was not until the Revenue Act of 1918, Pub. L. No. 254, ch. 18, §252, 40 Stat. 1057, 1085, that the first time limitation on refund claims was enacted:

> " . . . if, upon examination of any return of income made pursuant to this Act . . . it appears that amount of income, war-profits or excess profits tax has been paid in excess of that properly due, then, . . . any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer."

A five-year period was selected, for that was the period the Commissioner then had to assess a tax against the taxpayer. S. Rep. No. 617, 65th Cong., 3rd Sess. at 10, *cited in* J. Seidman, Legislative History of Federal Income Tax Laws, 1938-1861, 937-938 (1938).

One fact becomes readily apparent from a reading of this provision: If a taxpayer were to pay a *de minimis* amount of tax and file a refund claim therefor within the five-year period, the period in which the Commissioner was required to make a refund for that particular tax year would be extended indefinitely.

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[8] It provided, in pertinent part:

> " . . . upon the examination of any return of income made pursuant to this title . . . if it shall appear that amounts of tax have been paid in excess of those properly due, the taxpayer shall be permitted to present a claim for refund thereof. . . . "

An additional restriction was added in the Act of March 4, 1923, ch. 276, §252(a), 42 Stat. 1504, which required the taxpayer to file a refund claim within two years of the time the tax was paid. Nevertheless, if the taxpayer paid a *de minimis* amount and then filed a claim therefor, the taxpayer had effectively kept the period for filing refund claims for that particular tax year open indefinitely.

Only one year later, in order to eliminate such gamesmanship, Congress enacted §281(b) of the Revenue Act of 1924, Pub. L. 176, ch. 234, 43 Stat. 301, which reduced the claim-filing period from five years to four, and which provided the first limitation on the *amount* of any refund claim:

> " . . . (1) no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before such expiration or such four years a claim therefor is filed by the taxpayer nor (2) shall the amount of the credit or refund exceed the portion of the tax paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the credit or refund."

The Senate Report accompanying this provision, which is the most revealing expression of legislative intent in the history of tax refund legislation, provides, in pertinent part:

> "In order that a late payment of a small portion of the tax due may not extend the time for filing a claim for refund of the entire tax, a limitation has been inserted by the committee restricting the amount of credit or refund to the portion of

> the tax paid during the four years immediately preceding the filing of the claim."[9]

S. Rep. No. 398, 68th Cong. 1st Sess. 33 (1924), *cited in* J. Seidman, *supra*, 767-768.

Contrary to the Petitioner's assertion that §6511(b)(2) is designed to cut-off "stale claims,"[10] Congress' intent in enacting the predecessor to §6511(b) is manifest: It was to prevent the Commissioner from being whipsawed by sharp taxpayers. The statutory regime prior to the Revenue Act of 1924 encouraged taxpayers to pay a *de minimis* amount of tax and file a refund claim therefor, thereby holding the period for refunds of greater amounts for that tax year open indefinitely. But the period that the Commissioner had to assess additional tax for that year was not extended by the taxpayer's refund claim, since the

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[9] The Senate floor discussion with respect to this amendment is as follows:

> MR. McKELLAR. This amendment seems to provide that a taxpayer may not reopen a claim.
>
> MR. SMOOT. He may not reopen it by simply paying a small amount, say a few dollars on it. I will, in a very few words, state what that means.
>
> . . .
>
> MR. SMOOT. This subdivision has been rewritten to limit the amount of refunds and credits to the portion of the tax paid within four years preceding the filing of the claim, in order that the taxpayer may not, by a small payment, reopen the entire case. It is better written, and is exactly the same as the rules and regulations now in force.

65 Cong. Rec. 7209 (1924), *cited in* J. Seidman, *supra*, 767-768.

[10] See Petitioner's Brief at 20, n. 12

period the Commissioner has to assess a tax is governed by separate statutory limitations.

Section 281 of the 1924 Act was carried through to §322 of Internal Revenue Code of 1939, modified by the shortening of the period of refund claims from the time of payment from four years to two years. *Jones, Collector v. Liberty Glass Co.*, 332 U.S. 524 (1947).

Section 322 was amended in 1942 in one revealing respect. Section 322(b)(3) thereof was added, to provide that if the Commissioner and the taxpayer had, by agreement, extended the time for which the Commissioner could assess a tax, then the period for which the taxpayer could file a refund claim was extended for a commensurate period, plus six months. Revenue Act of 1942, ch. 619, Pub. L. No. 753, §169. This amendment was explained by the Ways and Means Committee as follows:

> "Your committee has amended the existing law to permit the taxpayer to file a claim for credit or refund after the ordinary period of assessment has expired where the taxpayer and the Commissioner have by waiver extended the period of assessment of the tax. It seems only proper that if the Government is given the right by waiver to make assessments for the taxable year after the period for assessment has expired, the taxpayer should also have the right to additional time for filing refund claims for the same year." H.R. Rep. No. 2333, 77th Cong. 2d Sess. at 52, *cited in* 2 J. Seidman, Legislative History of Federal Income and Excise Profits Tax Laws, 1953-1939, 2272 (1954).

Here again, Congress manifested its intent to make the period for which the taxpayer could file a refund claim

co-extensive with the period the Commissioner had to assess the underlying tax.

Section 322 of the 1939 Code was carried through to §6511 of the Internal Revenue Code of 1954. But §322(b) of the 1939 Code differed from §6511(a) of the 1954 Code, as first enacted, in one significant particular: Under §322(b)(1) of the 1939 Code, the time for filing a refund claim commenced on the date the return was *filed;*[11] under §6511(a) of the 1954 Code, as first enacted, the time for filing a refund claim commenced on the date the return was *due.*[12] 15 Mertens, *Law of Federal Income Taxation*, §58.02 at 7 (1996).

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[11] Section 322(b)(1) of the 1939 Code provided, in pertinent part:

> "(1) Period of Limitation. – Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after whichever of such periods expires the later."

[12] As first enacted, Section 6511(a) provided, in pertinent part:

> "(a) Period of Limitation on Filing Claim. – Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was required to be filed (*determined without regard to any extension of time*) or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid." [Emphasis added.]

This distinction is more than historical. The First Circuit's analysis of the interplay of §6511(b) and §6511(a) in *Oropallo v. United States*, 994 F.2d 25 (1993), *cert. denied*, 114 S. Ct. 705 (1994), upon which the Petitioner relies,[13] is expressly premised upon the First Circuit's assumption that the three-year period for filing a refund claim can begin to run with a *late-filed return.*[14] The First Circuit reasoned that if a late-filed return could form the basis for a refund claim, then the limitation periods contained in §6511(a) are illusory. If §6511(a) represents an illusory statute of limitations, then the "look-back" periods contained in §6511(b) must represent untollable bars, in order to save §6511 from being totally illusory.

A comparison of §322(b)(1) of the 1939 Code and §6511(a) of the 1954 Code, as first enacted, reveals that the First Circuit's premise was probably correct under the 1939 Code, but is incorrect under the 1954 Code: A late-filed return cannot begin the three-year period for refund claims; as first enacted, the period for filing refund claims commenced with the due date of the return, regardless of when the return was filed.[15]

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[13] See Petitioner's Brief at pp. 35-36.

[14] The First Circuit's assumption that the three-year period for filing a refund claim contained in §6511(a) could commence with a late-filed return was rejected by the Ninth Circuit in *Miller v. United States*, 38 F.3d 473 (1994).

[15] The First Circuit's analysis in *Oropallo* has been heavily criticized in the scholarly literature. *See* Danos, "Special Report," *Tax Notes*, April 17, 1995, at 395, and Stein, "Will Equitable Tolling of the Statute of Limitations Gain Wider Acceptance in Tax Cases?" 81 J. Tax'n, 370 (Dec. 1994). No

Section 6511(a) was last amended by Section 82 of the Technical Amendments Act of 1958. The period for filing refund claims was amended to commence with the due date of the return plus any extensions thereof. In order to correlate the "look-back" periods in §6511(b) to the periods in §6511(a), §6511(b) was amended, and the phrase "plus the period of any extension of time for filing the return" added to §6511(b)(2)(A). 15 Mertens, *Law of Federal Income Taxation*, §58.02, at 7 (1996).

Although no legislative history of this 1958 amendment has been found, a contemporaneously prepared explanation of the 1958 Technical Amendments Act prepared by Commerce Clearing House notes that the change was made to conform to the rule for *assessments;* i.e., the tax refund "look-back" periods contained in §6511(b) were intended to mirror the period the Commissioner has to assess a tax. "1958 Federal Income Tax Law Changes Explained," ¶291, No. 39, (CCH) Stand. Fed. Tax Rep., Sept. 4, 1958. That period commences on the date the taxpayer who has obtained an extension actually files the return, not on the due date of the return.

The long history of §6511(b) and its progenitors reveals that, contrary to the Petitioner's unsupported assertion, §6511(b) is not intended as a bar to "stale claims," but is intended to prevent sharp taxpayers from extending the period for filing refund claims beyond the period the Commissioner has to assess a tax. As Professor

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scholarly article approving of the First Circuit's analysis in *Oropallo* has been found.

Saltzman concludes in his monumental treatise, *IRS Practice and Procedure*:

> "Limitations on the time for filing a claim for refund and on the amount of the credit or refund are related to the period the Service has to assess a deficiency. Normally, a deficiency in tax must be assessed within three years from the date a return is filed. Consequently, where a taxpayer files a claim for refund within three years after filing a return, the Service is not foreclosed from examining the return and assessing a deficiency. During the assessment period, both the taxpayer and the Service are able to question the entire amount of the tax reported on the return. However, as previously noted, once the period of limitations on assessment has expired, the Service is not permitted to assess additional tax for the year. Therefore, the rules limiting the amount refundable on claims a taxpayer files outside the three-year assessment period put the taxpayer in the same position as the Service: neither can use an error in the return affirmatively, neither the taxpayer by seeking to obtain a refund nor the Service by attempting to collect additional tax.
>
> "By limiting the amount of credit or refund to the tax paid during the two years immediately preceding the claim, the taxpayer is prevented from extending the time for filing a claim for refund of the tax paid or deemed paid on the due date by the expedient of making a late payment of a small portion of the tax due. Also, since the Service is prohibited from assessing additional tax and can simply defend the government's entitlement to the allegedly overpaid tax, the taxpayer is similarly restricted by being

> permitted only to contest liability for the tax paid within the prior two years. Therefore, a taxpayer who files a claim more than three years after the return is due is generally restricted to recovering an assessed and paid tax deficiency." ¶11.05 at 11-26 - 11-27 (2d ed. 1991).

If the §6511(b) limitations on credit or refund are intended to limit the recovery of an *assessed tax*, it begs the question what possible application these limitations could have to a taxpayer – such as Stanley McGill – who, due to his disability, could not file a timely tax return, and who, as a result of his failure to file, could not begin the period of assessment against the Commissioner. As a result of his inability to file a return, the period of limitation on the Commissioner to assess a tax against Mr. McGill was *tolled*. Indeed, the period of assessment was tolled throughout the remainder of his life. If the period of limitations for assessment was thus tolled, and if the intent of §6511(b) was to make the period for filing refund claims co-terminous with the period the Commissioner has to assess a tax, the "look-back" periods of §6511(b) should be tolled to the same extent.

D. THE OVERALL STRUCTURE OF OUR SYSTEM OF TAX COLLECTION, BASED AS IT IS UPON SELF-ASSESSMENT, SUPPORTS A CONCLUSION THAT CONGRESS INTENDED EQUITABLE TOLLING TO APPLY TO TAX REFUND CLAIMS.

Our "complex and comprehensive" system of tax collection is grounded upon a system of self-assessment. *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984).

Each year, every citizen or resident is required to compute his own income, determine his own tax liability, and forthrightly report that tax liability to the Treasury on forms prescribed by the Commissioner. *Commissioner v. Dane-Wells*, 321 U.S. 219 (1944). Each such form must be executed by the taxpayer *under penalty of perjury*.

In the event that the taxpayer later discovers that he has overpaid his taxes and desires a refund, he is required to first file a claim for refund. That refund claim must set forth, in detail, the *exact* grounds upon which the claim is based, and it too must be executed under the penalty of perjury. A claim that does not comply with these requirements will not be considered a refund claim for any purpose. Treas. Regs. §301.6402-2(b) (1977). If the claim is denied, and the taxpayer later brings suit to recover the overpaid tax, any material difference between the "exact grounds" contained in the refund claim and the taxpayer's complaint will be attacked as containing a fatal *variance*. *See, e.g., United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269 (1931).

In *Irwin v. Veterans Affairs*, 498 U.S. 89 (1990), this Court enunciated a broad rule to the effect that once Congress has waived its sovereign immunity in a given area, then making the rule of equitable tolling applicable to suits against the government is "likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation," warranting a "rebuttable presumption" in favor of tolling. *Id.* at 95.

At bottom, the Petitioner maintains that in our system of self-assessment, Congress *intended* that the same restrictions and limitations that apply to taxpayers in

possession of their faculties must apply with equal force to taxpayers who have no ability to assess their own taxes, no ability to appreciate the penalties of perjury, and no ability to compose a refund claim. Moreover, the Petitioner maintains that Congress *intended* to create regime of tax collection whereunder the period of time that a disabled taxpayer has to file a refund claim may have expired while – due to the taxpayer's inability to file a tax return – the period of limitation on the Commissioner to assess the underlying tax may not yet have begun.

E. IN THE EVENT THAT THE PERIOD THAT A TAXPAYER HAS TO FILE A REFUND CLAIM IS TOLLED, THE PERIOD THAT THE COMMISSIONER HAS TO ASSESS ADDITIONAL TAX SHOULD BE TOLLED FOR A COMMENSURATE PERIOD.

Respondent suggests that in the event that the period that the taxpayer has to file a refund claim is tolled, then the period that the Commissioner has to assess a tax against the taxpayer for that tax year should be tolled commensurately. Such a rule would be consistent with the goal of §6511(b), which is to make the period that the taxpayer has to file a refund claim co-extensive with the period that the Commissioner has to assess the underlying tax. If such a rule were adopted, a taxpayer asserting the doctrine of equitable tolling would do so with the full knowledge that if reasonable cause for invoking the doctrine were found, it would have the effect of opening the entire tax year for review, thus limiting the availability of equitable tolling only to those who were truly prevented from filing a refund claim on a timely basis.

CONCLUSION

The judgment of the court of appeals in *United States v. Scott* should be affirmed. The judgment of the court of appeals in *United States v. Brockamp* should be affirmed, with the case remanded to the District Court for further proceedings.

Respectfully submitted.

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August 29, 1996

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

MARIAN BROCKAMP, ADMINISTRATOR OF THE ESTATE OF STANLEY B. MCGILL

UNITED STATES OF AMERICA, PETITIONER

v.

NICHOLAS T. SCOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Cases:	Page
Amoco Production Co. v. *Newton Sheep Co.*, 85 F.3d 1464 (10th Cir. 1996)	10, 12
Ancel v. *United States*, 398 F.2d 456 (7th Cir. 1968)	11
Aplington v. *United States*, 169 F. Supp. 815 (Ct. Cl.), cert. denied, 361 U.S. 821 (1959)	4
Badaracco v. *Commissioner*, 464 U.S. 386 (1984)	11
Bryan v. *United States*, 99 F.2d 549 (10th Cir. 1938), cert. denied, 305 U.S. 661 (1939)	4
Cary v. *Curtis*, 44 U.S. (3 How.) 236 (1845)	5
Cheatham v. *United States*, 92 U.S. 85 (1875)	3, 6
Commissioner v. *Lundy*, 116 S. Ct. 647 (1996)	8, 11
Curtis's Aministratix v. *Fiedler*, 67 U.S. (2 Black) 461 (1863)	5
Flora v. *United States*, 362 U.S. 145 (1960)	5, 6
George Moore Ice Cream Co. v. *Rose, Collector of Internal Revenue*, 289 U.S. 373 (1933)	5, 6
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990)	2
Kaltreider Construction, Inc. v. *United States*, 303 F.2d 366 (3d Cir.), cert. denied, 371 U.S. 877 (1962)	4
Kings County Savings Institution v. *Blair*, 116 U.S. 200 (1886)	2, 6
Kingston Products Corp. v. *United States*, 368 F.2d 281 (Ct. CL. 1966)	4
Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350 (1991)	9
Miller v. *United States*, 38 F.3d 473 (1994)	8
Nichols v. *United States*, 74 U.S. (7 wall.) 122 (1868)	3, 7
Oropallo v. *United States*, 994 F.2d 25 (1st Cir. 1993), cert. denied, 510 U.S. 1050 (1994)	8, 9

Cases—Continued: Page

Rock Island, Ark. & La. R.R. v. *United States*, 254 U.S. 141 (1920) 6
Rothensies v. *Electric Battery Co.*, 329 U.S. 296 (1946) 5, 6, 7, 13, 14
Stepka v. *United States*, 196 F. Supp. 184 (E.D. N.Y. 1961) 4
Toledo Edison Co. v. *McMaken, Collector of Internal Revenue*, 103 F.2d 72 (6th Cir.), cert. denied, 308 U.S. 569 (1939) 7
United States v. *National City Lines*, 337 U.S. 78 (1949) 12
Webb v. *United States*, 66 F.3d 691 (4th Cir. 1995) 12
Williams v. *United States*, 228 F.2d 129 (4th Cir. 1955) , cert. denied, 351 U.S. 986 (1956) 4
Young v. *United States*, 203 F.2d 686 (8th Cir. 1953) 4

Statutes:

Internal Revenue Code (26 U.S.C.):
§§ 6501-6504 10
§ 6511 ..... 2, 11
§ 6511(a) 7, 8, 9, 10, 12
§ 6511(b) 8, 9
§ 6511(b)(1) 7, 9, 10
§ 6511(b)(2) 10, 11
§ 6511(b)(2)(A) 10
§ 6511(b)(2)(A) and (B) 11, 12
§ 6511(b)(2)(A)-(C) 8
§ 6511(b)(2)(B) 10
§ 6514 8
§ 6514(a) 7, 8
§ 7422(a) 2, 7
§ 7422(f) 5
Tucker Act, ch. 359, 24 Stat. 505 5

Miscellaneous: Page

William T. Plumb, Jr., *Tax Refund Suits Against Collectors of Internal Revenue*, 69 Harv. L. Rev. 685 (1947) 6

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1225

UNITED STATES OF AMERICA, PETITIONER

v.

MARIAN BROCKAMP, ADMINISTRATOR OF THE ESTATE OF STANLEY B. MCGILL

UNITED STATES OF AMERICA, PETITIONER

v.

NICHOLAS T. SCOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. The essential premise of respondents' argument in this case is fundamentally flawed. Respondents contend that, because the historical tax refund action against the Collector shared similarities with the common law action for "money had and received," suits against the Collector "were as amenable to equitable tolling as any common law action against a

private party" (Resp. Br. 12). Respondents then theorize that, when the action against the Collector was displaced by the refund suit that Congress authorized directly against the United States, there was no "intent * * * to abridge the amenability of such suits to equitable tolling" (*ibid.*).

These contentions lack any support in the case law. They are also historically inaccurate, logically flawed and divorced from the text of the statutory provisions that govern the timely filing of tax refund suits.

(a) No case has been cited by respondents—and none can be cited—for the proposition that the statutory limitations on the action formerly permitted against the Collector were subject to equitable tolling.[1] In particular, no case held that "equitable" grounds may make compliance with these statutory requirements unnecessary. Instead, both in suits against the Collector and in suits directly against the United States, the established rule has been that (*Kings County Savings Institution* v. *Blair*, 116 U.S. 200, 205-206 (1886) (emphasis added)):

> no suit can be maintained for taxes illegally collected unless a claim therefor has been made within the time prescribed by the law. When the law says the claim must be presented within two years, the implication is that, unless so presented, the right to demand the repayment of the tax is lost, and the Commissioner has no authority to refund it, and, of course, the right of suit is gone. We regard the presentation of claims to the Commissioner of Internal Revenue for the refunding of a tax alleged to have been illegally exacted as a condition on which alone the government consents to litigate the lawfulness of the original tax. *It is clearly not the intent of the statute to allow the collector to be sued unless the taxpayer has first applied for relief to the Commissioner within the time and in the manner pointed out by law and relief has been denied him.*

[1] The decision of the court below—which conflicts with all other appellate decisions on the question presented in this case—offers no support for the novel theory that respondents now advance. The court of appeals held (Pet. App. 4a-5a) that this Court's 1990 decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, required the conclusion that a "rebuttable presumption" of equitable tolling applies to tax refund suits. The court stated that it found no evidence in the language or history of Section 6511 (26 U.S.C.) to rebut the presumption of equitable tolling under *Irwin* (Pet. App. 5a-6a). The analysis and conclusion of the court of appeals are incorrect for the reasons described in detail in our opening brief (Pet. Br. 15-41).

Recognizing that it is essential to the "orderly conduct of the government that its taxes should be promptly paid, and drawbacks speedily adjusted," this Court explained in *Cheatham* v. *United States*, 92 U.S. 85, 89 (1875), that the statutory requirement of a timely refund claim represents "a condition on which alone the government consents to litigate the lawfulness of the original tax." *Ibid.* The Court held that this limitation upon the government's consent to suit was not subject to judicial modification, stating that "[i]f there existed in the courts * * * any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary." *Ibid.* Accord, *Nichols* v. *United States*, 74 U.S. (7 Wall.) 122, 130-131 (1868).

Contrary to respondents' unsupported assertion, the courts have long and uniformly concluded that "principles of equity may not override statutory requirements for timely filing of tax refund claims." *Kingston Products Corp.* v. *United States*, 368 F.2d 281, 288 (Ct. Cl. 1966). Indeed, prior to the decision in the present case, the courts of appeals had unanimously held that strict compliance with the statutory limitations on tax refund claims is required and that equitable tolling has no application to tax refund suits. See, *e.g.*, Pet. Br. 21-22 (citing cases); *Williams* v. *United States*, 228 F.2d 129, 132 (4th Cir. 1955), cert. denied, 351 U.S. 986 (1956); *Young* v. *United States*, 203 F.2d 686, 689 (8th Cir. 1953); *Bryan* v. *United States*, 99 F.2d 549, 551 (10th Cir. 1938), cert. denied, 305 U.S. 661 (1939). See also *Kaltreider Construction, Inc.* v. *United States*, 303 F.2d 366, 368-369 (3d Cir.), cert. denied, 371 U.S. 877 (1962); *Aplington* v. *United States*, 169 F. Supp. 815 (Ct. Cl.), cert. denied, 361 U.S. 821 (1959). This settled understanding was correctly summarized in *Stepka* v. *United States*, 196 F. Supp. 184 (E.D.N.Y. 1961), when the court stated that "[t]he limitation of time provided for [the commencement of a tax refund suit] is inflexible" and may not be equitably tolled by "the inability to commence the action by reason of mental incompetency." *Id.* at 185. Respondents' unsupported assertion that tax refund suits against the Collector were subject to equitable tolling "at least until 1966" (Resp. Br. 12) is demonstrably incorrect.

(b) Respondents also err in contending (Resp. Br. 7-8) that the suit that was historically permitted against the Collector was simply a common law action that was inherently subject to equitable modification. From 1845, when the first statute authorizing suits

against the Collector was enacted, until 1966, when such suits were expressly barred by Section 7422(f), the refund suit against the Collector was a creature of statute, not of common law. As this Court stated in *Flora* v. *United States*, 362 U.S. 145, 153 (1960), quoting *Curtis's Aministratrix* v. *Fiedler*, 67 U.S. (2 Black) 461, 479 (1863):

> [W]e are not satisfied that the suit against the Collector was identical to the common-law action of assumpsit for money had and received. * * * [After the Act of 1845 authorized the suit against the Collector,] the Court no longer regarded the suit as a common-law action but rather as a statutory remedy which "in its nature [was] a remedy against the Government."

See also Pet. Br. 16-17 n.7.[2] As a statutory remedy, any recovery against the Collector was "subject to

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[2] The action against the Collector originated before the United States consented to suit in tax refund cases. See *George Moore Ice Cream Co.* v. *Rose, Collector of Internal Revenue*, 289 U.S. 373, 382 (1933). When Congress required the Collector to remit tax payments to the Treasury regardless of a taxpayer's protest, the Court held that the Collector was also immune from suit and that the common law action against the Collector was no longer available. *Cary* v. *Curtis*, 44 U.S. (3 How.) 236 (1845). Congress thereafter authorized a statutory recovery against the Collector, and the suit proceeded under the statute, not under common law. See *Rothensies* v. *Electric Battery Co.*, 329 U.S. 296, 299 (1946) (the suit against the Collector is based upon "statutory warrant").

Beginning with the Tucker Act in 1887, Congress enacted a series of statutes that have authorized suits for tax refunds directly against the United States. See Pet. Br. 18 & n.9. By 1933, although the suit against the Collector still existed, it was "an anomalous relic of bygone modes of thought," and the presence of the Collector as a defendant was "merely a remedial

such restrictions as Congress might provide." William T. Plumb, Jr., *Tax Refund Suits Against Collectors of Internal Revenue*, 69 Harv. L. Rev. 685, 690-691 (1947). In all of the statutes enacted since 1845 to authorize tax refund suits, it has been "required, in one form or another, that a written protest or claim for refund be filed with the Treasury before the collector could be sued." *Id.* at 691 n. 32. See also Pet. Br. 16-18.

As this Court explained in *Rothensies* v. *Electric Battery Co.*, 329 U.S. 296 (1946), the limitations that Congress enacted upon suits against the Collector were not subject to judicial modification on equitable grounds of "fairness." *Id.* at 301. As the Court further noted in *Rothensies*, this conclusion was made manifest by (what is now) Section 6514 of the Code, which specifies that a tax refund is "erroneous" and "void" if the express and detailed statutory requirements for timely refund claims have not been met. 329 U.S. at 299 n.1. See also Pet. Br. 32. Both with respect to suits against the Collector and suits directly against the United States, courts have consistently required strict compliance with the statute of limitations for the filing of refund claims.[3] See, *e.g.*, *Kings County Savings Institution* v. *Blair*, 116 U.S. at 204; *Cheatham* v. *United States*, 92 U.S. at 89;

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expedient for bringing the Government into court." *George Moore Ice Cream Co., Inc.* v. *Rose, Collector of Internal Revenue*, 289 U.S. at 382-383. See also *Flora* v. *United States*, 362 U.S. at 151-152.

[3] Indeed, it was in a case rejecting an untimely tax refund claim that Justice Holmes stated for the Court that "[m]en must turn square corners when they deal with the Government." *Rock Island, Ark. & La. R.R.* v. *United States*, 254 U.S. 141, 143 (1920).

Nichols v. *United States*, 74 U.S. (7 Wall.) at 131; *Toledo Edison Co.* v. *McMaken, Collector of Internal Revenue*, 103 F.2d 72, 75-76 (6th Cir.), cert. denied, 308 U.S. 569 (1939).

(c) Respondents err in suggesting (Resp. Br. 12) that the provisions of the Internal Revenue Code that authorize suits directly against the United States reveal no intent to require strict compliance with the statutory time limitations on refund claims. In making that contention, respondents wholly ignore Section 6514 of the Code, which specifies that a refund or credit made on a claim filed outside the express statutory periods of limitation must be considered "erroneous" and "void." 26 U.S.C. 6514(a). See *Rothensies* v. *Electric Battery Co.*, 329 U.S. at 299 n.1.

For the reasons described in detail in our opening brief (Pet. Br. 18-20), the structure of the Internal Revenue Code compels the conclusion that the time requirements for refund claims are strict in their application. Congress has specified that a suit may not be "maintained in any court for the recovery of any internal revenue tax" unless a refund claim "has been duly filed with the Secretary, according to the provisions of law in that regard" (26 U.S.C. 7422(a)). The applicable provisions of law establish specific and detailed time limitations upon refund claims (Section 6511(a)) and further specify that "[n]o credit or refund shall be allowed or made after the expiration of the period of limitation prescribed * * * unless a claim for credit or refund is filed by the taxpayer *within such period*" (26 U.S.C. 6511(b)(1) (emphasis added)). Congress reinforced these limitations on refunds by further specifying that, if a refund claim is filed *after* the expiration of the specific statutory periods of limitation, any refund or credit given on such a claim

is "erroneous" and to be considered "void" (26 U.S.C. 6514(a)). Moreover, even when a refund claim *is* filed within the periods specified in Section 6511(a), Congress limited "the amount of the credit or refund" to the "portion of the tax paid within" those express statutory periods—and thereby again precluded any recovery on untimely claims. See 26 U.S.C. 6511(b)(2)(A)-(C); Pet. Br. 32-34.

These provisions manifest the plain intent of Congress that the statutory limitations on refund claims are to be strictly enforced and that any recovery upon claims that are not filed within the specific statutory periods is prohibited. No other intent can plausibly be ascribed to them. As the First Circuit held in *Oropallo* v. *United States*, 994 F.2d 25, 30-31 (1st Cir. 1993), cert. denied, 510 U.S. 1050 (1994), and as we explain in our opening brief (Pet. Br. 27-38), these precise, detailed and interlocking limitations on tax refund claims in Section 6511(a), Section 6511(b) and Section 6514 of the Code are fundamentally inconsistent with any application of the doctrine of equitable tolling.[4]

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[4] Respondents correctly note (Resp. Br. 19) that in *Oropallo* the First Circuit assumed (without deciding) that a return filed after it was due would constitute a "'return' which triggers application of the three-year limitations period" in Section 6511(a). 994 F.2d at 27. This Court made that same assumption, without deciding that issue, in its recent decision in *Commissioner* v. *Lundy*, 116 S. Ct. 647, 656 (1996). In *Lundy*, the Court noted that the Ninth Circuit has expressed a contrary view. *Ibid.*, citing *Miller* v. *United States*, 38 F.3d 473, 475 (1994).

In this case, as in *Lundy*, there is no need to resolve that question of interpretation of Section 6511(a), for neither of respondents filed a return within three years of the date that the taxes were paid. As the court stated in *Oropallo*, that question

2. Respondents err in contending (Resp. Br. 13-22) that the statutory limits on the "amount" of any refund established by Section 6511(b) are subject to equitable tolling. Statutes that define substantive limitations on recoveries are not subject to equitable modification. See Pet. Br. 34-35 (citing cases). That principle has particular significance for monetary claims against the United States, for only Congress may determine the conditions upon which the United States consents to be sued.

(a) Section 6511(b)(1) specifies that "[n]o credit or refund" is to be allowed unless a claim for refund is filed by the taxpayer within "the period of limitation *prescribed in subsection (a) for the filing of a claim for credit or refund*" (26 U.S.C. 6511(b)(1) (emphasis added)). In turn, Section 6511(a) specifies that a claim for refund must be filed within "3 years from the time the return was filed or 2 years from the time the tax was paid" (26 U.S.C. 6511(a)). A claim that is filed more than "3 years from the time the return was filed or 2 years from the time the tax was paid" is thus not filed within the period that is "prescribed" by that statute. "No credit or refund" on such a claim is therefore permitted under the precise text of Section 6511(b)(1). See, *e.g.*, *Amoco Production Co.* v. *Newton Sheep Co.*, 85 F.3d 1464, 1471 (10th Cir. 1996).

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of interpretation of Section 6511(a) has no bearing on the question whether equitable tolling of this statute of limitations is permitted (994 F. 2d at 27), for the provisions of Section 6511(b) establish a substantive period of repose that is fundamentally inconsistent with equitable tolling. 994 F.2d at 30-31. Under the analysis of this Court in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), the court concluded that the "rebuttable presumption" of equitable tolling has been rebutted. See Pet. Br. 35-38.

(b) Section 6511(b)(2) provides detailed substantive limitations on the "amount" of any refund claim. Under Section 6511(b)(2)(A), if the taxpayer files a refund claim within "the 3-year period prescribed in subsection (a)"—that is, "within 3 years from the time the return was filed" (26 U.S.C. 6511(a))—"the amount of the credit or refund shall not exceed the portion of the tax paid within" three years prior to the filing of the claim (26 U.S.C. 6511(b)(2)(A)).[5] If the claim is not filed within three years of the return, Section 6511(b)(2)(B) then limits the "amount" of the recovery to "the portion of the tax paid during the 2 years immediately preceding the filing of the [refund] claim." 26 U.S.C. 6511(b)(2)(B).

Respondents contend (Resp. Br. 13-22) that these limits on the "amount" of refunds established in Section 6511(b)(2) do not mean what they say. Relying upon excerpts from the legislative histories of this provision, respondents contend that the statute seeks only to make the time for filing a refund claim "coextensive" with the time that the government has for making a tax assessment (Resp. Br. 18). The provisions of Section 6511(b)(2) that limit the "amount" that may be recovered on refund claims, however, contain no reference to the separate provisions that determine the period in which the government may assess the tax. Moreover, the statutes that determine the period for assessment (26 U.S.C. 6501-6504) do not refer in any manner to the refund claim provisions of Section 6511. The statutory limitations on assessment are thus "wholly irrelevant" to the interpretation and application of the separate statutory limitations on claims for refund. *Ancel* v. *United States*, 398 F.2d 456, 458-459 (7th Cir. 1968).[6]

[5] The amount of recovery may include payments made during any additional time permitted by a timely "extension of time for filing the return" (26 U.S.C. 6511(b)(2)(A)).

Respondents nonetheless maintain that nothing in the legislative history supports the conclusion that Section 6511(b)(2) is designed to prevent taxpayers from asserting "stale claims" (Resp. Br. 20). The very portion of the history on which they rely, however, states that the statute prevents a taxpayer from "reopen[ing]" a tax year by making a small payment after the statute of limitations has expired (*id.* at 16 & n.9). As the plain text of the statute reflects, it also prevents a taxpayer (such as respondents) from "reopen[ing]" a tax year by filing a return and refund claim more than three years after the tax is paid. 26 U.S.C. 6511(b)(2)(A) and (B).[7] The obvious purpose of

[6] Any suggestion that the statutory period for assessment should be linked with the period for timely refund claims would require a substantial restructuring of the text of these provisions. Respondents propose, as a solution to this textual problem, that, if equitable tolling applies to a taxpayer's refund claim, then "the period the Commissioner has to assess a tax * * * should be tolled to the same extent" (Resp. Br. 22). But that sort of unfettered disregard for express statutory text has never been sanctioned by this Court, and respondents do not suggest that any decision of any court could be cited as authority for their proposition. Instead, as this Court recently observed, a contention that the statutory limitations on tax refund claims could be "improve[d]" by amendment is one that must be addressed to Congress, not to the courts. *Commissioner* v. *Lundy*, 116 S. Ct. 647, 657 (1996), quoting *Badaracco* v. *Commissioner*, 464 U.S. 386, 398 (1984).

[7] The fact that the extract from the legislative history that respondents cite provides only one example of how "stale claims" are barred by the plain text of this provision does not "restrict the meaning of the statutory phrase * * * precisely

the statute is precisely to bar the assertion of "stale claims" by preventing taxpayers from obtaining any refund of payments made (i) more than three years before the refund claim if a return was filed or (ii) more than two years before the claim if a return was not filed. *Ibid.* See Pet. Br. 32-35.

As the court concluded in *Webb* v. *United States*, 66 F.3d 691 (4th Cir. 1995), petition for cert. pending, No. 95-1360, the statute in this manner establishes a "substantive right" to be free from liability after the expressly defined periods for the filing of timely refund claims have expired. 66 F.3d at 700. Such substantive limitations on claims against the government are not subject to equitable tolling. *Ibid.* Because the taxes involved in this case were paid by respondents more than three years before their claims for refund were filed, no "portion of the tax" may be refunded under the express mandate of Sections 6511(b)(2)(A) and (B). Thus, even apart from the limitations period imposed by Section 6511(a), respondents therefore cannot prevail in this case as a matter of substantive law. *Amoco Production Co.* v. *Newton Sheep Co.*, 85 F.3d at 1472.

3. Both in financial magnitude and in the number of transactions, the internal revenue process dwarfs most other economic activities within the United States. Hundreds of billions of dollars and hundreds of millions of tax returns are processed each year. Under the three-year statute of limitations established by Section 6511(a), approximately half a billion returns remain subject to challenge at any single time. See Pet. Br. 25 & n.16. If that three-year period

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to the illustration selected" (*United States* v. *National City Lines*, 337 U.S. 78, 81 (1949)).

were not effective as a limitation on refund claims, and if the government were required to remain ready to address challenges to taxes paid over periods of undefined duration, it is not an exaggeration to say that billions of returns would remain subject to potential litigation.

Recognizing the enormity of the scale of the internal revenue process, this Court stated in *Rothensies* v. *Electric Battery Co.*, 329 U.S. at 301:

> It probably would be all but intolerable, at least Congress has regarded it as ill-advised, to have an income tax system under which there would never come a day of final settlement and which required both the taxpayer and the Government to stand ready forever and a day to produce vouchers, prove events, establish values and recall details of all that goes into an income tax contest.

Noting that a uniform statute of limitations for tax refund claims is of critical importance as a matter "of fairness as well as of practical administration of an income tax policy," *ibid.*, the Court stated: "If there are to be exceptions to the statute of limitations, it is for Congress rather than for the courts to create and limit them." *Id.* at 303.

Congress, of course, has authority to make statutory adjustments to address inequities in the refund process—an authority that it has excercised in several narrow contexts. See Pet. Br. 23-24. Congress also retains authority to address particular inequities in individual cases through the process of private legislation. *Id.* at 27. This Court has consistently and correctly concluded, however, that, although the statutes of limitations may cause "[b]oth hardships to the taxpayers and losses to the reve-

nues," Congress has not authorized "the equity-minded judge to seek for ways of relief in individual cases." *Rothensies* v. *Electric Battery Co.*, 329 U.S. at 302.

* * * * *

For the foregoing reasons and the reasons set forth in our opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

SEPTEMBER 1996